(29,019)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1922.

No. 469.

THE CITY OF NEWARK, PLAINTIFF IN ERROR,

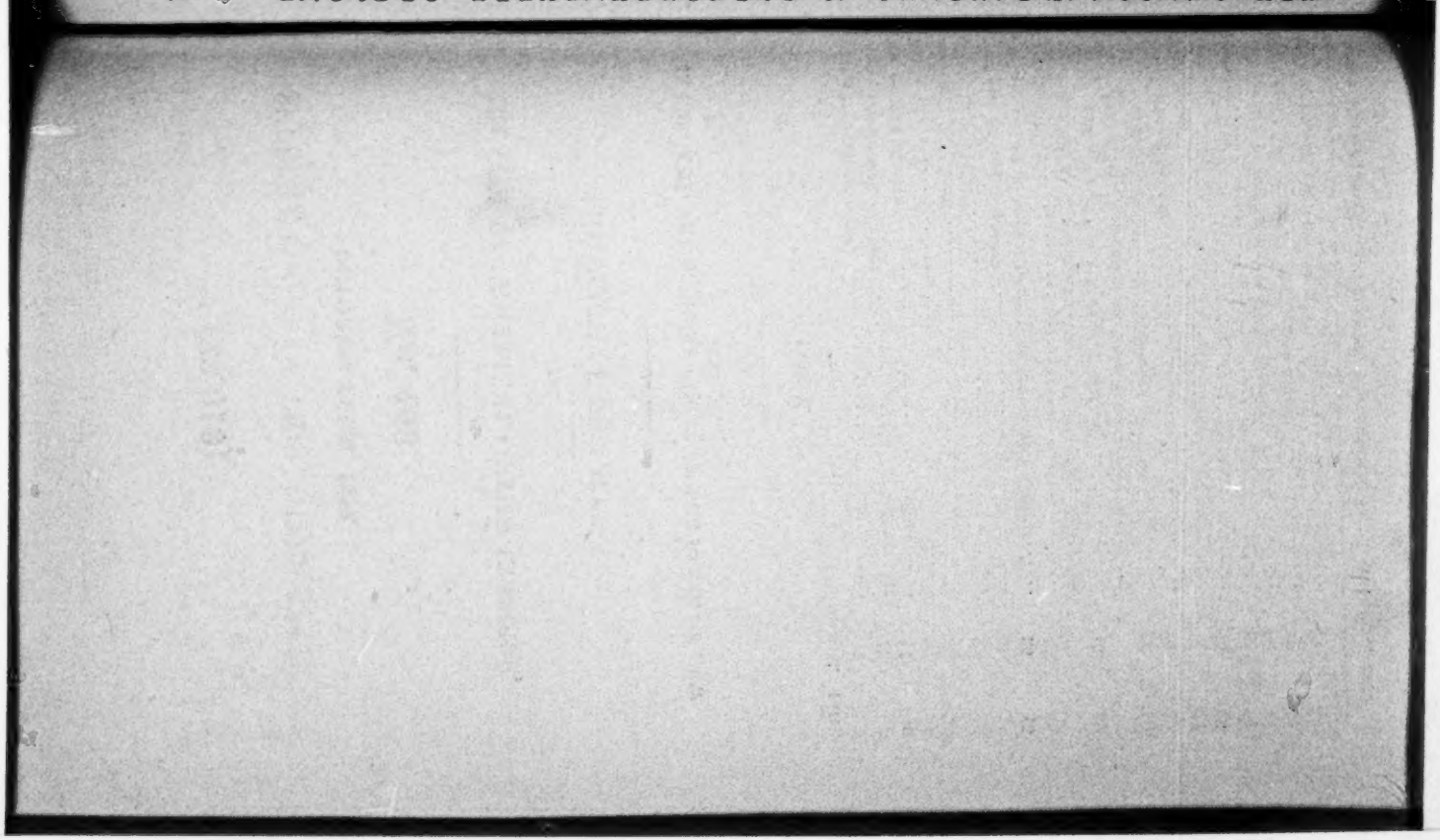
vs.

THE STATE OF NEW JERSEY.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NEW JERSEY.

INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., AUGUST 5, 1922.



1 To the Honorable Edwin Robert Walker, Chancellor of the State of New Jersey and acting as President Judge of the Court of Errors and Appeals of New Jersey:

And now comes the City of Newark, a municipal corporation of the State of New Jersey and represents that on the sixth day of March, Nineteen hundred and twenty two a final judgment was duly entered by the Court of Errors and Appeals of the State of New Jersey affirming the judgment entered by the New Jersey Supreme Court in a suit at law wherein the State of New Jersey was plaintiff and the City of Newark was defendant, and awarding costs in favor of the State of New Jersey.

That this is an action commenced by the State of New Jersey to recover from the City of Newark the amount claimed to be due for surplus water used and appropriated by said The City of Newark for the years ending June 30th, 1915; December 31st, 1917; December 31st, 1918; December 31st, 1919; December 31st, 1920, pursuant to the provisions of Chapter 252 of the Laws of 1907 of the State of New Jersey, which authorizes, under certain conditions, the then State Water Supply Commission (now the Department of Conservation and Development) to assess the value of water diverted by municipalities in excess of that diverted at the time of the approval of said act of the legislature on June 17th, 1907; and authorizes in the event of the failure of the municipalities to pay such appraised amount, an action to be brought in the name of the State of New Jersey to recover same for the benefit of the State. The complaint of the State of New Jersey shows that on June 17th, 1907 the City of Newark was diverting from the Pequannock River daily,

2 36,241,666 gallons of water and conceded that the diversion to that extent is permitted by the State of New Jersey without claim for compensation or license fee. The amount of the judgment recovered by the State of New Jersey against the City of Newark in the New Jersey Supreme Court was $18,104.08 besides costs and is the aggregate of the license fees which was sought to be recovered and to be assessed by the Board of Conservation and Development of the State of New Jersey upon the water diverted by the City of Newark from the Pequannock River in excess of 36,241,666 gallons and was at the rate of one dollar per million gallons. There was no dispute as to the amount of water diverted and the sole question for determination for the Court of Errors and Appeals of New Jersey was whether the defenses set up and relied upon by the City of Newark constituted a valid defense to the action. The City of Newark sets up its claim by way of special defenses, which were, upon motion stricken out and judgment entered in the State of New Jersey against the City of Newark in the amount above mentioned.

The distinctive and separate defense which was overruled by the Supreme Court and resulted in the entry of a judgment against the City of Newark for $18,104.08, besides costs, sets up and avers that by an Act of the Legislature incorporating the Morris Canal and

Banking Company, which is a public act passed the 31st day of December, 1824, its amendments and supplements, including especially an act passed on the 5th day of March, 1836, the State of New Jersey granted unto the said Morris Canal and Banking Company, which by said original act was incorporated and given authority to construct an artificial navigation between the Delaware River at or near Easton and the Passaic River at or near Newark, the right or privilege to take and appropriate the waters of the State of New Jersey which should be required by said company to build, operate and maintain such canal or artificial navigation; that by a subsequent act passed January 26th, 1828, and entitled "An Act to authorize the Morris Canal and Banking Company to extend the Morris Canal to the waters of the Hudson" the said company was given the right to extend the said proposed canal from the
3 Passaic River at the City of Newark to the Hudson River at or near the City of Jersey City to the same effect as if it had originally been authorized by its charter to construct a canal or artificial navigation to connect the waters of the Delaware River near Easton with the waters of the Hudson River at or near Jersey City.

That by said act of the Legislature dated the 5th of March, 1836, it was enacted that on such navigable feeder or feeders, as, by virtue of that act, or the act of the original incorporation of the Morris Canal and Banking Company, may be constructed by the Canal Company for the purpose of conducting into the waters of the Morris Canal the waters of Long Pond (now known as Greenwood Lake) or other waters that may be required for the supplying of the said Canal, the said Canal Company was authorized to charge and receive the same rates of toll as were then lawful and chargeable upon the canal, and that in order to enable the Canal Company to procure the requisite lands and premises and construct the several basins, reservoirs and feeders authorized by the original act of incorporation and the amendments thereof, the said company was authorized to increase its capital stock to an amount not exceeding $600,000,

That shortly thereafter the said company did, at large expense, by the construction of dams and feeders and the diversion of waters from lakes, ponds, and streams, take and appropriate, and thereby acquire the right to take and continue to use the waters so appropriated, included in which, pursuant to legislative authority aforesaid, was the water that is now being used by the City of Newark in the quantities and amount set out in the complaint in this suit and thereby the Morris Canal and Banking Company, acquired from the State of New Jersey the right to use the waters so appropriated and diverted; that continuously thereafter the said company, having so acquired from the State the right to use the said waters, continued so to use them in the maintenance and operation of the said canal until the month of May, 1871; and that on the 14th day of March of that year the legislature passed a further supplement to the charter of the said company, known as
4 Chapter CLIII of the Pamphlet Laws of that year, entitled "A further supplement to an Act to incorporate a company

to form an artificial navigation between the Passaic and Delaware Rivers" passed December 31st, 1824; that by the second section of this last act it was made lawful for the said company or its lessee or lessees to use the surplus waters of the said canal of said company or any of its feeders not needed for the purpose of navigation, in furnishing and supplying the inhabitants of any city, town or village along the line of said canal or in the vicinity thereof with a sufficient quantity of pure and wholesome water for manufacturing or domestic or other uses; and to make contracts with corporate authorities of any such city, town or village, or with individuals for said supply of water, for such compensation as may be mutually agreed upon and to erect such works and make such alterations in the canal as may be necessary or proper to enable the company or its lessee or lessees to furnish such supply of water from the said canal, and by the same act the said company was authorized to lease the canal, together with all its boats, property and works, appurtenances and franchises to any person or persons or corporation either perpetually or for such short a time and upon such rates and agreements as may be agreed upon; that in pursuance of the power contained in said act the said company on the 4th day of May, 1871, executed and delivered to the Lehigh Valley Railroad Company a perpetual lease of the entire canal and navigation works of the Canal Company as the same were then laid and constructed from the Delaware River at Phillipsburg to the Hudson River at Jersey City.

That on April 2d, 1888, the Legislature of this State passed an act entitled "An Act to authorize any of the municipal corporations of this State to contract for a supply or a further or other supply of water therefor," being known as Chapter CCL of the laws of 1888, which last mentioned act authorized any municipal corporation of the State to enter into a contract with any water company or other company for a term of years for obtaining and furnishing a supply or a further or other supply of water to such municipal corporation for the purpose of extinguishing fires and for such other lawful uses and purposes as may be deemed necessary or convenient, provided that such contract may contain an option for the acquiring by such municipal corporation of the land, water and water rights for such supply on terms to be fixed in said contract.

That pursuant to the said act last mentioned the City of Newark, defendant herein, being desirous of procuring for the present and future needs of the City a supply of pure and wholesome water for domestic purposes, the extinguishment of fires and other lawful uses, entered into a contract in writing with the Lehigh Valley Railroad Company, a corporation of the State of Pennsylvania and the lessee above named, and the East Jersey Water Company, a corporation organized under the General laws of the State of New Jersey, for the purpose of procuring for said city such a supply of water for the sum of $6,000,000.

That in aid of said contract and for the purpose of enabling the said Railroad Company and the said East Jersey Water Company to perform their covenants therein, the Morris Canal and Banking

Company united with the Lehigh Valley Railroad Company in the assignment and conveyance to the East Jersey Water Company of such water and water rights of the Pequannock Watershed, the Wynockie Watershed and the Ramapo Watershed as shall become necessary to enable the East Jersey Water Company to perform its part of said contract with the City of Newark.

That immediately thereafter the East Jersey Water Company proceeded to locate, build and construct in one of the watersheds, within the State of New Jersey, on a tributary of the Passaic River, known as Pequannock Watershed, embracing lands within Morris, Passaic and Sussex Counties in this State, certain large reservoirs and a pipe line to conduct water therefrom to the distributing reservoir of the City of Newark and to make and construct works and buildings for this purpose and secure the necessary property for that purpose.

That it was, among other things, agreed by the parties to said contract that the City of Newark should have the right at any time after the execution thereof and until within a year after the
6 date of the final completion of all the works built and constructed, to terminate that part of the contract which provided for the purchase of water by the City of Newark from the East Jersey Water Company by the million gallons, by tht City's exercising the option therein given and thereby becoming the owner absolutely in its own right of the lands, water, water rights, rights of way, dams and reservoirs, and works constructed by the said East Jersey Water Company for the purpose of said contract with all other rights and appurtenances upon certain terms and conditions therein expressed; that the said City of Newark, by resolution duly passed by the proper municipal bodies, approved of the exercise by and on behalf of the said City of the said option of purchase.

That there being some dispute as to whether or not within the time, limited by said original contract between the City of Newark and the East Jersey Water Company, the said last named company was able to deliver the quantity of water in said contract provided for to the said City of Newark in accordance with the terms of the said contract, a subsequent contract dated the first day of August, 1892, was entered into between the said City and the said Company by virtue whereof the said City executed and delivered to the water company its corporate bonds aggregating in amount $4,000,000 and deposited bonds of a like character in the sum of $2,000,000 with the Fidelity Title and Deposit Company (now the Fidelity Union Trust Company) a trustee selected by the parties to said supplemental agreement, to be held by it and delivered to the water company when the conditions mentioned in the said contract were in fact fully performed on the part of the said water company, and that for the purpose of further securing the city against any default in the performance of said company's obligation, the said water company simultaneously made and executed to the said city a bond in the penal sum of $500,000 and deposited with the trustee aforesaid $500,000 in bonds of the City of Newark for the better securing to the city of the performance by the water company of its obligation to com-

plete and perfect title to the lands, water and water rights to which the City was entitled under the said contract and for the performance of such other covenants therein contained as upon inspection thereof will appear, including the fact that the pipe line or
7 conduit which had been constructed by the water company for the purpose of conveying water to the said city should be found sufficient, when tested, to answer the requirements of the said contract.

Immediately upon the execution of said supplemental contract and bond the said company executed and delivered to the City of Newark, a deed of conveyance of the water and water rights for the purpose of enabling it to fulfill and perform its covenants with the city. Said deed was dated May 2nd, 1892, and a true copy thereof is annexed to and made a part of the answer as Exhibit "A."

That after the payment of said city of Newark to the water company of the said bonds and the transfer to it of the title to certain water and water rights by the water company, it became apparent, prior to May 1st, 1896 that the pipe line constructed by the water company was not of sufficient size to meet the requirements of said contract and that it was impossible for said company to convey and deliver, by means of the pipe then laid, at the receiving reservoirs in the City of Newark, 50,000,000 gallons of water daily, and that the said Company would, in order to comply with the requirements of said contract, be required to enlarge the capacity of the said pipe line for the delivery of said water. Whereupon, on or about the first day of May, 1896, the said City of Newark entered into a further and additional supplemental contract with said water company, pursuant to the terms of which the said water company proceeded to construct and lay down a second line of pipe from the Macopin Intake Reservoir located in the Pequannock Watershed to the receiving reservoir of the said City of Newark located at Belleville in the County of Essex.

That at or about this time it became apparent that the capacity of the reservoirs built and constructed in the watershed was insufficient to furnish to the City at all times the daily supply of 50,000,000 gallons required by the aforesaid original contract and that it would be necessary to impound a larger quantity of water than the reservoirs at that time would contain. Whereupon the
8 said water company, during the year 1896 built and constructed within the said watershed and upon a branch of the said Pequannock River, above the point at which the Oak Ridge Reservoir is located, at or near the village of Canistear another large reservoir for impounding water, known as the Canistear Reservoir.

That as the City of Newark insisted that the reservoirs located at Oak Ridge and Clinton and at the Macopin Intake, described in the conveyance to the City of Newark by the water company dated May 2nd, 1892 were insufficient to regulate the flow of water and make diversion therefrom into the said pipe lines in such quantity as to furnish a daily supply of 50,000,000 gallons forever, the said city, by virtue of the seventeenth paragraph of its original contract with said East Jersey Water Company invoked the aid and author-

ity of the Court of Chancery of New Jersey to enforce the specific performance of the covenants and agreements contained in the said original contract and the said deed from the water company to the City dated May 2nd, 1892, and that such proceedings were had in the Court of Chancery in the said suit so commenced, that on or about the 24th day of September, 1900, it was ordered, adjudged and decreed by the Chancellor (said City of Newark being the complainant and said East Jersey Water Company, the said Morris Canal and Banking Company and the said Lehigh Valley Railroad Company being the defendants) that

"said the Morris Canal and Banking Company and the Lehigh Valley Railroad Company have conveyed to the said The East Jersey Water Company by good and sufficient conveyance in the law, such water and water rights as they or either of them may have had in the said Pequannock Watershed at the date the said original contract was made, or so much thereof as will enable the said the East Jersey Water Company to fulfill and keep and perform the said contract, dated September 24th, 1889, hereinabove referred to, and have performed the covenants and conditions in such contract contained."

9 That certain other corporations in said answer particularly named, which had acquired the right to divert the waters of the Pequannock River and its tributaries at and above the Macopin Intake Dam, joined in a further deed with the said East Jersey Water Company, dated September 21st, 1900, for the purpose of further assuring and confirming to the said City of Newark the right to impound, take, divert, withdraw and use all the waters of the Pequannock River and its tributaries above the Macopin Intake Dam, by virtue whereof there was a final fulfillment of the contracts between the said water Company and the said City, and a full discharge of the mutual obligations thereof, and that, accordingly, the said City of Newark acquired the title to a supply of water from the Pequannock River and the possession of a completed plant fully competent and capable of furnishing to the said City 50,000,000 gallons of water per day forever, which is the same water for the consumption of which this action is brought; all of which was acquired prior to the passage of Chapter 252 of the Laws of 1907 creating the State Water Supply Commission, and therefore the defendant claims that before the passage of said last mentioned act the city, had, in manner aforesaid, acquired the right granted by the State of New Jersey to divert, use and take the supply of water from the Pequannock Watershed to the extent of 50,000,000 gallons daily.

And your petitioner further avers that in its said answer it denies the power of the Board of Conservation and Development to assess said license fee against it, and expressly charged that said chapter 252 of the pamphlet laws of the State of New Jersey for the year 1907, page 633, entitled "An Act to establish the said Water Supply Commission, and to define its powers and duties, and the conditions under which waters of this State may be diverted" approved June 17th, 1907, was unconstitutional and deprived your petitioner of

property without due process of law and contravened the Fourteenth Amendment to the Constitution of the United States and impaired the obligation of a contract between the State of New Jersey and your petitioner in contravention of Article I of Section 10, Paragraph I of the Constitution of the United States.

And your petitioner further avers that at the argument of said cause, both in the Supreme Court of the State of New Jersey and in the Court of Errors and Appeals of the State of New Jersey, it expressly made the following federal claims, to wit:

(*a*) That the Act of June 17, 1907, entitled "An Act to establish a State water supply commission, and to define its powers and duties, and the conditions under which waters of this State may be diverted," is unconstitutional because it provides for an arbitrary taking of property owned by your petitioner in its private or proprietary capacity for public use, without just compensation; and

(*b*) That said Act of June 17, 1907, is unconstitutional because it deprives your petitioner of property without due process of law and contravenes the Fourteenth Amendment to the Constitution of the United States.

(*c*) That said act of June 17, 1907 is unconstitutional because it impairs the obligation of a contract and offends against Article I, section 10, paragraph I of the constitution of the United States.

And your petitioner further avers that said claims were considered, discussed in the opinion, and were determined to be invalid, by the Court of Errors and Appeals of the State of New Jersey.

That the Court of Errors and Appeals of the State of New Jersey denied the title, right, privilege and immunity thus specially set up and claimed by the petitioner.

Your petitioner further avers that in the aforesaid judgment and proceedings certain errors were committed to the prejudice of your petitioner, all of which will more fully appear from the Assignment of Errors, which is filed herewith.

Wherefore your petitioner prays that a Writ of Error from the Supreme Court of the United States may issue in this case to the New Jersey Supreme Court for the correction of Errors so complained of and that a transcript of record, proceedings and papers in this cause duly authenticated by the clerk of the New Jersey Supreme Court may be sent to the Supreme Court of the United States as provided by law.

Dated Newark, New Jersey, the 17th day of May, A. D. Nineteen hundred and twenty-two.

JEROME T. CONGLETON,
Corporation Counsel, Attorney for The City of Newark, Petitioner and Plaintiff in Error.

[Endorsed:] Supreme Court of the United States. The City of Newark, Plaintiff in Error, vs. State of New Jersey, Defendant in Error. Error to New Jersey Supreme Court. Petition for Writ of Error. Jerome T. Congleton, Corporation Counsel, Attorney for plaintiff in error, 920 Broad Street, Newark, New Jersey. Filed May 20, 1922. Enoch L. Johnson, Clerk.

12 In the Supreme Court of the United States.

THE CITY OF NEWARK, Plaintiff in Error,

vs.

STATE OF NEW JERSEY, Defendant in Error.

Error to New Jersey Supreme Court.

Order Allowing Writ of Error.

On reading of petition of the City of Newark, a municipal corporation of the State of New Jersey for Writ of Error and the Assignment of Errors, and upon due consideration of the record of said cause:

It is ordered, that a Writ of Error be allowed from the Supreme Court of the United States to the Supreme Court of the State of New Jersey as prayed for in said petition and that said Writ of Error and citation thereon be issued, served and returned to the Supreme Court of the United States in accordance with law upon condition that the said petitioner and plaintiff in error, the City of Newark, give security in the sum of Thirty-six thousand, three hundred and nine dollars and forty eight cents, ($36,309.48) that the said plaintiff in error shall prosecute said Writ of Error to effect that if said plaintiff in error fails to make this plea shall answer to the defendant in error for all costs and damages that may be adjudged or decreed on account of said Writ of Error,

And said plaintiff in error now presenting a bond in the sum of thirty six thousand three hundred and nine dollars and forty eight cents ($36,309.48),

It is ordered that same be and is hereby approved.

13 In witness whereof I have hereunto set my hand and seal this Eighteenth day of May, Nineteen hundred and twenty two. E. R. WALKER,

Chancellor of the State of New Jersey, Presiding Judge of the Court of Errors and Appeals of New Jersey.

[Endorsed:] Supreme Court of the United States. The City of Newark, Plaintiff in Error, vs. State of New Jersey, Defendant in Error. Error to New Jersey Supreme Court. Order allowing writ of Error. Jerome T. Congleton, Attorney for Plaintiff in error, 920 Broad Street, Newark, New Jersey. Filed May 20, 1922. Enoch L. Johnson, Clerk.

14 Know all men by these presents, that The City of Newark, a municipal corporation of the State of New Jersey, is held and firmly bound unto The State of New Jersey, in the sum of thirty six thousand three hundred nine and 48/100 dollars, to be paid to the said The State of New Jersey, to which payment well and truly to be made The City of Newark, a municipal corporation of the State of New Jersey, as aforesaid, binds itself by these presents.

Sealed with the corporate seal of the said The City of Newark, and dated this seventeenth day of May, Nineteen hundred and twenty two.

Whereas, the above named plaintiff in error, The City of Newark, a municipal corporation of the State of New Jersey, has sued out a writ of error from the United States Supreme Court to the New Jersey Supreme Court, to reverse the judgment of the New Jersey Supreme Court entered on the eighth day of December, 1921, and affirmed by the Court of Errors and Appeals of the State of New Jersey on March 6, 1922, in the suit of The State of New Jersey vs. The City of Newark;

Now therefore, the condition of this obligation is such that, if the above named plaintiff in error shall prosecute its said writ of error to effect and answer all costs and damages that may be adjudged, if it shall fail to make good its plea, then this obligation is to be void; otherwise to remain in full force and effect.

[SEAL.] THE CITY OF NEWARK.
F. C. BREIDENBACH,
Mayor.

Attest:
W. J. EGAN,
City Clerk.

15 Approved this 18th day of May 1922.
E. R. WALKER,
Chancellor of the State of New Jersey, Acting as President Judge of the New Jersey Court of Errors and Appeals.

STATE OF NEW JERSEY,
County of Essex, ss:

Be it remembered, that on this seventeenth day of May, in the year one thousand nine hundred and twenty two, before me, the subscriber, a Master in Chancery of New Jersey, personally appeared William J. Egan, who, being by me duly sworn, doth depose and make proof to my satisfaction that he well knows the corporate seal of The City of Newark, a municipal corporation of New Jersey, the obligor named in and which executed the foregoing bond or obligation; that the seal thereto affixed is the proper corporate seal of the

said The City of Newark, that the same was so affixed thereto, and the said deed signed and delivered by Frederick C. Breidenbach, who was at the time and execution thereof the Mayor of said The City of Newark in the presence of the said deponent, as the voluntary act and deed of said The City of Newark, and that the said deponent thereupon signed the same as subscribing witness.

WILLIAM J. EGAN.

Sworn and subecribed before me at Newark, N. J., the date aforesaid.

GEORGE E. CARPENTER,
Master in Chancery of New Jersey.

[Endorsed:] Bond. The City of Newark to The State of New Jersey. Filed May 20, 1922. Enoch L. Johnson, Clerk. Approved as to form. Jerome T. Congleton, Corporation Counsel.

16 [Vignette.]

New Jersey Supreme Court.

I, Enoch L. Johnson, Clerk of the Supreme Court of the State of New Jersey do hereby certify that the original Bond in the case of The City of Newark, plaintiff in error, vs. State of New Jersey, defendant in error, was lodged in this Office on the Twentieth day of May, Nineteen Hundred and Twenty-two.

In testimony whereof, I have hereunto set my hand and affixed the Official Seal of said Court at Trenton, this 8th day of June, A. D. 1922.

[Seal of the Supreme Court.]

ENOCH L. JOHNSON,
Clerk.

17 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Honorable the Justices of the Supreme Court of the State of New Jersey, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment which is in the said New Jersey Supreme Court before you, or some of you, and which was affirmed by the Court of Errors and Appeals in the State of New Jersey, being the highest Court of law or equity of the said State in which a decision could be had in the said suit between the State of New Jersey and The City of Newark, wherein was drawn in question the validity of the statute or, or an authority exercised under the said State on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity,

a manifest error hath happened to the great damage of the said The City of Newark as by its complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court, at Washington, within thirty days from the date thereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to
18 the laws and customs of the United States should be done.

Witness, the Honorable William Howard Taft, Chief Justice of the United States, the eighteenth day of May, in the year of our Lord, one thousand nine hundred and twenty two.

[SEAL.]

GEORGE T. CRANMER,
Clerk of the District Court of the United States for the District of New Jersey,
By R. S. CHEVRIER,
Deputy.

Allowed by

E. R. WALKER,
Chancellor of the State of New Jersey, Acting as President Judge of the Court of Errors and Appeals of the State of New Jersey.

The Answer of the Justices of the Supreme Court of the State of New Jersey, within Named.

The record and proceedings whereof mention is within made, with all things touching and concerning the same, we do certify to the Supreme Court of the United States in a certain schedule to this writ annexed as within we are commanded.

WM. S. GUMMERE,
C. J.

[Endorsed:] In the Supreme Court of the United States. The City of Newark, Plaintiff in Error, vs. State of New Jersey, Defendant in Error. Error to New Jersey Supreme Court. Writ of Error. Jerome T. Congleton, Corporation Counsel, Attorney for Plaintiff in error, 920 Broad Street, Newark, N. J. Filed May 20, 1922. Enoch L. Johnson, Clerk.

19 [Vignette.]

New Jersey Supreme Court.

I, Enoch L. Johnson, Clerk of the Supreme Court of the State of New Jersey do hereby certify that the original Writ of Error in the case of The City of Newark, plaintiff in error, vs. State of New Jersey, defendant in error was lodged in this Office on the Twentieth day of May, Nineteen hundred and twenty-two.

In testimony whereof I have hereunto set my hand and affixed the Official Seal of said Court at Trenton, this 8th day of June, A. D. 1922.

[Seal of the Supreme Court.]

ENOCH L. JOHNSON,
Clerk.

20 In the Supreme Court of the United States.

THE CITY OF NEWARK, Plaintiff in Error,

vs.

STATE OF NEW JERSEY, Defendant in Error.

Error to New Jersey Supreme Court.

Assignment of Errors.

And now comes the City of Newark, a municipal corporation of the State of New Jersey, petitioner and plaintiff in error by Jerome T. Congleton, a corporation counsel, and in connection with its petition for a writ of error shows that, in the record and proceedings and in the rendering of the judgment and decision of the Court of Errors and Appeals, of New Jersey in the above entitled cause manifest error has intervened to the prejudice of this petitioner and plaintiff in error in this, to wit:

First. The Court of Errors and Appeals of the State of New Jersey erred in holding that an Act of the State of New Jersey entitled "An Act to Establish a State Water Supply Commission and to Define its Powers and Duties under Conditions in which Waters of this State may be Diverted," approved June 17th, 1907, was constitutional and did not violate the fourteenth amendment to the Constitution of the United States.

Second. The said Court of Errors and Appeals of the State of New Jersey erred in holding that an Act of the State of New Jersey entitled "An Act to Establish a State Water Supply Commission and to Define its Powers and Duties under Conditions in which

Waters of this State may be Deferred," approved June 17th,
21 1907 was constitutional and did not violate paragraph 1 of section X of Article 1 of the Constitution of the United States.

By reason whereof, this petitioner and plaintiff in error prays that the said judgment of the New Jersey Supreme Court affirmed by the Court of Errors and Appeals of the State of New Jersey may be reversed, etc.

Dated: Newark, New Jersey, seventeenth day of May, A. D. nineteen hundred and twenty two.

JEROME T. CONGLETON,
Corporation Counsel, Attorney for The City of Newark, Petitioner and Plaintiff in Error.

[Endorsed:] Supreme Court of the United States. The City of Newark, Plaintiff in Error, vs. State of New Jersey, Defendant in Error. Error to New Jersey Supreme Court. Assignment of Errors. Jerome T. Congleton, Attorney of Plaintiff in Error, 920 Broad Street, Newark, New Jersey. Filed May 20, 1922. Enoch L. Johnson, Clerk.

22 UNITED STATES OF AMERICA, *ss:*

To the State of New Jersey, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, at Washington, D. C. within thirty days from the date of the service of this citation, pursuant to a writ of error filed in the Clerk's Office of the New Jersey Supreme Court, wherein The City of Newark, a municipal corporation of the State of New Jersey, is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness, the hand and seal of the Honorable, the Chancellor of the State of New Jersey, acting as President Judge of the New Jersey Court of Errors and Appeals, this eighteenth day of May in the year of our Lord one thousand nine hundred and twenty two.

[SEAL.] E. R. WALKER,
Chancellor of the State of New Jersey, Acting as President Judge of the New Jersey Court of Errors and Appeals.

Attest:
THOMAS F. MARTIN,
Clerk New Jersey Court of Errors and Appeals.

23 UNITED STATES OF AMERICA,
District of New Jersey, ss:

I hereby certify that I have duly served the attached citation on Thomas F. McCran, Attorney General of the State of New Jersey, as attorney of record for the defendant in error, by handing to and leaving with —— —— a true copy of this writ at the office of the said Attorney General of the State of New Jersey, at the State House, Trenton, New Jersey.

——— ———,
United States Marshal.
——— ———,
Deputy.

Fees and Costs: —.

Service of this Citation and receipt of a copy thereof for defendant in error acknowledged this 19th day of May, 1922.

THOMAS F. McCRAN,
Atty. Gen. of N. J.,
Attorney of Defendant in Error.
WILLIAM NEWCORN,
Asst. Atty. Gen.,
Of Counsel.

[Endorsed:] In the Supreme Court of the United States. The City of Newark, Plaintiff in Error, vs. State of New Jersey, Defendant in Error. Error to New Jersey Supreme Court. Citation. Jerome T. Congleton, Corporation Counsel, Attorney for Plaintiff in error, 920 Broad Street, Newark, New Jersey. Filed May 23, 1922. Enoch L. Johnson, Clerk.

24 *Notice of Appeal and Grounds Therefor.*

New Jersey Court of Errors and Appeals.

THE STATE OF NEW JERSEY, Plaintiff-Appellee,

vs.

THE CITY OF NEWARK, Defendant-Appellant.

Action at Law.

Notice and Ground of Appeal.

To Honorable Thomas F. McCran,
Attorney General of the State of New Jersey.

SIR:

Take notice that the defendant appeals to the Court of Errors and Appeals of the State of New Jersey from the whole of the judgment entered in the above entitled cause on the following ground:

1. That the Court erred in granting plaintiff's motion to strike out the first separate defense interposed by the defendant to each of the five counts of the Amended Complaint of the plaintiff.

JEROME T. CONGLETON,
Corporation Counsel,
Attorney of Defendant-Appellant.

[Endorsed:] New Jersey Court of Errors and Appeals. The State of New Jersey, Plaintiff Appellee, vs. The City of Newark, Defendant Appellant. Action at Law. Notice and Ground of Appeal. Jerome T. Congleton, Corporation Counsel, Atty. of Defendant-Appellant, 920 Broad Street, Newark, New Jersey. Service of the within Notice and Ground of Appeal is hereby acknowledged this seventeenth day of October, Nineteen hundred and twenty one. Thomas F. McCran, Attorney General of the State of New Jersey. Filed Oct. 29, 1921. Enoch L. Johnson, Clerk.

25

New Jersey Supreme Court.

STATE OF NEW JERSEY, Plaintiff,

vs.

THE CITY OF NEWARK, Defendant.

Action at Law. On Postea.

Judgment Record.

Thomas F. McCran, Attorney General, Attorney.

The City of Newark the defendant in this cause was summoned to answer unto State of New Jersey the plaintiff therein in an action at law upon the following complaint:

(Summons issued February 10, 1921.)

The plaintiff, the State of New Jersey, says:

First Count.

1. That the defendant, during the whole of the year ending June 30, 1915, was and still is a municipality of this State.

2. That during the whole of said year ending, as aforesaid, defendant did divert the waters of a certain stream of this State, to wit, the waters of the Pequannock River, for the purpose of a public water supply for said municipality and has continuously diverted said water for the purpose aforesaid to and including December 31, 1919.

3. That under the provisions of an act of the legislature of this State entitled, "An Act to establish a State Water Supply Commis-

sion, and to define its powers and duties, and the conditions under which waters of this State may be diverted," approved June 17, 1907, being Chapter 252 of the Session Laws of 1907, the defendant was permitted to divert from the Pequannock River aforesaid, an average daily free allowance of water to the amount of 36,241,668 gallons, said last mentioned amount being the amount of
26 water which was being diverted by said municipality on June 17th, aforesaid, the date when the act aforesaid became effective and operative.

4. That the average daily diversion of water by said municipality during the period mentioned in paragraph one was 41,916,668 gallons, said amount so diverted being 5,675,000 gallons in excess of the amount which said municipality was entitled to divert under the provisions of the act aforesaid.

5. That by virtue of the provisions of said act said defendant then and there became and was liable to pay to the State Treasurer for the use of the State for the excess so diverted an amount to be fixed by the State Water Supply Commission at the rate of not less than one dollar nor more than ten dollars per million gallons.

6. That by virtue of the provisions of an act entitled "An act to establish a Department of Conservation and Development, and to consolidate therein the State Water Supply Commission, the Board of Forest Park Reservation Commissioners, the State Geological Survey, the Washington Crossing Commission, the State Museum Commission and the Fort Nonsense Park Commission," approved April 8, 1915, the Board of Conservation and Development on the last mentioned date succeeded to and exercised and still exercises all the rights and powers, and performs all the duties theretofore exercised and performed by or conferred and charged upon the State Water Supply Commission.

7. That said Commission fixed the sum of one dollar per million gallons as a license fee to be paid by said defendant for the amount of water so diverted by it in excess of its allowance, making the amount so due from said defendant for the whole year ending June 30, 1915, the sum of $2,071.37.

8. That said Commission certified the name of the defendant to the State Comptroller and the amount so due by said defendant for the diversion of waters, as aforesaid, to and including June 30, 1915, on the seventh day of February, 1916.

9. The State Comptroller, as provided by law, thereupon promptly notified the defendant of its said indebtedness to the State.

27 10. That the sum specified in the notice by the State Comptroller to the defendant, as aforesaid, became and was payable on or before the first day of July then next.

11. That the defendant wholly failed and neglected to pay the amount so due or any part thereof to the State Treasurer on or before

the first day of July, 1916, and still fails and neglects to make such payment as aforesaid.

12. That the State Comptroller upon the failure of the defendant to make such payment, as aforesaid, certified on the first day of July, 1916, to the Attorney general the name of said defendant and the amount so due by it, for collection, and it then and there became and was the duty of the Attorney General to take immediate steps to collect the amount so due by an action in the name of the State.

The plaintiff demands of the defendant the sum of $2,071.37, the amount due from the defendant to the plaintiff for the whole of the year ending June 30, 1915.

Second Count.

1. The allegations of paragraph one of the first count are here repeated.

2. The allegations of paragraph two of the first count are here repeated.

3. The allegations of paragraph three of the first count are here repeated.

4. The average daily diversion of water by said municipality during the whole of the year ending December 31, 1917, was 46,300,000 gallons, said amount so diverted being 10,058,334 gallons in excess of the amount which said municipality was entitled to divert under the provisions of the act aforesaid.

5. The allegations of paragraph five of the first count are here repeated.

6. The allegations of paragraph six of the first count are here repeated.

7. The said Board fixed the sum of one dollar per million
28 gallons as a license fee to be paid by said defendant for the amount of water so diverted by it in excess of its allowance, making the amount so due from said defendant for the whole of the year ending December 31, 1917, the sum of $3,671.28.

8. That said Board finally certified the name of the defendant to the State Comptroller and the amount so due by said defendant for the diversion of waters as aforesaid to and including December 31, 1917, on the fourteenth day of February, 1918.

9. That the State Comptroller, as provided by law, thereupon promptly notified the defendant of its said indebtedness to the State.

10. That the sum specified in the notice by the State Comptroller to the defendant, as aforesaid, became and was payable on or before the first day of July then next.

11. That the defendant wholly failed and neglected to pay the amount so due or any part thereof to the State Treasurer on or before the first day of July, 1918.

12. That the State Comptroller, upon the failure of the defendant to make such payment as aforesaid, certified on the first day of July, 1918, to the Attorney General the name of the said defendant and the amount so due by it for collection and it then and there became and was the duty of the Attorney General to take immediate steps to collect the amount so due by an action in the name of the State.

The plaintiff demands of the defendant the sum of $3,671.28, the amount due from the defendant to the plaintiff for the whole year ending December 31, 1917.

Third Count.

1. The allegations of paragraph one of the first count are here repeated.

2. The allegations of paragraph two of the first count are here repeated.

3. The allegations of paragraph three of the first count are here repeated.

4. The average daily diversion of water by said municipality during the whole of the year ending December 31, 1918, was 49,895,890 gallons, said amount so diverted being 13,654,224 gallons in excess of the amount which said municipality was entitled to divert under the provisions of the act aforesaid.

5. The allegations of paragraph five of the first count are here repeated.

6. The allegations of paragraph six of the first count are here repeated.

7. The said Board fixed the sum of one dollar per million gallons as a license fee to be paid by said defendant for the amount of water so diverted by it in excess of its allowance, making the amount so due from said defendant for the whole of the year ending December 31, 1918, the sum of $4,938.79.

8. That said Board finally certified the name of the defendant to the State Comptroller and the amount so due by said defendant for the diversion of waters as aforesaid to and including December 31, 1918 on the thirteenth day of February, 1919.

9. That the State Comptroller, as provided by law, thereupon promptly notified the defendant of its said indebtedness to the State.

10. That the sum specified in the notice by the State Comptroller to the defendant, as aforesaid, became and was payable on or before the first day of July then next.

11. That the defendant wholly failed and neglected to pay the amount so due or any part thereof to the State Treasurer on or before the first day of July, 1919.

12. That the State Comptroller, upon the failure of the defendant to make such payment as aforesaid, certified on the first day of July, 1918, to the Attorney General the name of said defendant and the amount so due by it for collection and it then and there became and was the duty of the Attorney General to take immediate steps to collect the amount so due by an action in the name of the State.

The plaintiff demands of the defendant the sum of $4,983.79, the amount due from the defendant to the plaintiff for the whole of the year ending December 31, 1918.

Fourth Count.

30 1. The allegations of paragraph one of the first count are here repeated.

2. The allegations of paragraph two of the first count are here repeated.

3. The allegations of paragraph three of the first count are here repeated.

4. The average daily diversion of water by said municipality during the whole of the year ending December 31, 1919, was 44,943,009 gallons, said amount so diverted being 8,701,343 gallons in excess of the amount which said municipality was entitled to divert under the provisions of the act aforesaid.

5. The allegations of paragraph five of the first count are here repeated.

6. The allegations of paragraph six of the first count are here repeated.

7. The said Board fixed the sum of one dollar per million gallons as a license fee to be paid by said defendant for the amount of water so diverted by it in excess of its allowance, making the amount so due from said defendant for the whole of the year ending December 31, 1919 the sum of $3,175.99.

8. That said Board finally certified the name of the defendant to the State Comptroller and the amount so due by said defendant for the diversion of waters as aforesaid to and including December 31, 1919, on the fourteenth day of February, 1920.

9. That the State Comptroller, as provided by law, thereupon promptly notified the defendant of its said indebtedness to the State.

10. That the sum specified in the notice by the State Comptroller to the defendant, as aforesaid, became and was payable on or before the first day of July then next.

11. That the defendant wholly failed and neglected to pay the amount so due or any part thereof to the State Treasurer on or before the first day of July, 1920.

12. That the State Comptroller, upon the failure of the defendant to make such payment as aforesaid, certified on the first
31 day of July, 1920, to the Attorney General the name of said defendant and the amount so due by it for collection and it then and there became and was the duty of the Attorney General to take immediate steps to collect the amount so due by an action in the name of the State.

The plaintiff demands of the defendant the sum of $3,175.99, the amount due from the defendant to the plaintiff for the whole of the year ending December 31, 1919.

The total sum demanded of the defendant by the plaintiff is $13,902.43.

THOMAS F. McCRAN,
Attorney General of New Jersey,
Attorney of Plaintiff.

(Filed Feb. 15, 1921.)

The plaintiff amends its complaint by the addition of the following count, to wit:

Fifth Count.

1. The allegations of paragraph one of the first count are here repeated.

2. The allegations of paragraph two of the first count are here repeated.

3. The allegations of paragraph three of the first count are here repeated.

4. The average daily diversion of water by said municipality during the whole of the year ending December 31, 1920, was 47,721,585 gallons, said amount so diverted being 11,479,918 gallons in excess of the amount which said municipality was entitled to divert under the provisions of the act aforesaid.

5. The allegations of paragraph five of the first count are here repeated.

6. The allegations of paragraph six of the first count are here repeated.

7. The said Board fixed the sum of one dollar per million gallons as a license fee to be paid by said defendant for the amount of water so diverted by it in excess of its allowance, making the amount
32 so due from said defendant for the whole of the year ending December 31, 1920, the sum of $4,201.65.

8. That said Board finally certified the name of the defendant to the State Comptroller and the amount so due by said defendant for

the diversion of waters as aforesaid to and including December 31, 1920, on the tenth day of February, 1921.

9. That the State Comptroller, as provided by law, thereupon promptly notified the defendant of its said indebtedness to the State.

10. That the sum specified in the notice by the State Comptroller to the defendant, as aforesaid, became and was payable on or before the first day of July then next.

11. That the defendant wholly failed and neglected to pay the amount so due or any part thereof to the State Treasurer on or before the first day of July, 1921.

12. That the State Comptroller, upon the failure of the defendant to make such payment as aforesaid, certified on the first day of July, 1921, to the Attorney General the name of said defendant and the amount so due by it for collection, and it then and there became and was the duty of the Attorney General to take immediate steps to collect the amount so due by an action in the name of the State.

The plaintiff demands of the defendant the sum of $4,201.65, the amount due to the plaintiff for the whole year ending December 31, 1920.

The plaintiff demands damages from the defendant on the first count amounting to $2,071.37, together with interest from the first day of July, 1915.

The plaintiff demands damages from the defendant on the second count amounting to $3,671.28, together with interest from the first day of July, 1918.

The plaintiff demands damages from the defendant on the third count amounting to $4,983.79, together with interest from the first day of July, 1919.

The plaintiff demands damages from the defendant on the fourth count amounting to $3,175.99, together with interest from the
38 first day of July, 1920.

The plaintiff demands damages from the defendant on the fifth count amounting to $4,201.65, together with interest from the first day of July, 1921, besides costs of suit.

THOMAS F. McCRAN,
Attorney General of New Jersey,
Attorney of Plaintiff.

(Filed Jul. 27, 1921.)

The defendant, The City of Newark, a municipal corporation of the State of New Jersey, says that:

Answer to First Count.

1. It admits the first paragraph;

2. It admits the second paragraph;

3. It denies the third paragraph;

4. It denies the fourth paragraph;

5. It denies the fifth paragraph;

6. It admits the sixth paragraph;

7. As to the statement contained in the seventh paragraph, that the said commission fixed the sum of one dollar per million gallons as a license fee to be paid by the defendant for the amount of water so diverted by it, in excess of its allowance, the defendant has not any knowledge or information thereof sufficient to form a belief, and it denies the right of said commission to fix said sum charged against it, and that there is any sum due from the defendant to the plaintiff as alleged in said paragraph.

8. As to the statement in the eighth paragraph, defendant has not any knowledge or information sufficient to form a belief, and therefore neither affirms nor denies the same, but leaves the plaintiff to make such proof thereof as it may deem proper;

9. It denies the ninth paragraph;

10. It denies the tenth paragraph;

11. It denies the eleventh paragraph.

12. As to the statement in the twelfth paragraph, defendant has not any knowledge or information thereof sufficient to form
34 a belief and therefore, neither affirms nor denies the same, but leaves the plaintiff to make such proof thereof as it may deem proper.

Answer to Second Count.

1. The answers to paragraphs 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11 and 12 of Count 1, are here repeated as the defendant's answers to the corresponding paragraphs of Count 2.

Answer to Third Count.

1. The answers to paragraphs 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11 and 12 of Count 1, are here repeated as the defendant's answers to the corresponding paragraphs of Count 3.

Answer to Fourth Count.

1. The answers to paragraphs 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11 and 12 of Count 1, are here repeated as the defendant's answers to the corresponding paragraphs of Count 4.

Answer to Fifth Count.

1. The answers to paragraphs 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11 and 12 of Count 1 are here repeated as the defendant's answers to corresponding paragraphs of Count 5 of the amended complaint herein.

First Separate Defense to Each of the Five Counts of the Amended Complaint.

1. That by virtue of an act to incorporate a company to form an artificial navigation between the Passaic and Delaware Rivers, passed on the thirty first day of December, Eighteen hundred and twenty-four, as found in the pamphlet laws of that year at page 158, which act was expressly made a public act and required to be judicially referred to by all judges, justices and others without being specially pleaded, and the various supplements and amendments thereto, including especially an act passed on the fifth day of March, Eighteen hundred and thirty six and found in the pamphlet laws of that year at page 262, the State of New Jersey granted unto the Morris Canal and Banking Company, which by said original act was incorporated and given authority to construct an artificial navigation between the Delaware River at or near Easton and the Passaic River at or near Newark, the right and privilege to take and appropriate the
35 waters of the State of New Jersey which should be required by said Company to build, operate and maintain such canal or artificial navigation; that by another act of the New Jersey Legislature passed on the twenty sixth day of January, Eighteen hundred and twenty eight, entitled "An Act to Authorize the Morris Canal and Banking Company to Extend the Morris Canal to the Waters of the Hudson," the said company was given the right to extend the said proposed canal from the Passaic River at the City of Newark to the Hudson River at or near the City of Jersey City to the same effect as if it had originally been authorized by its charter to construct a canal or artificial navigation to connect the waters of the Delaware near Easton with the waters of the Hudson River at or near the City of Jersey City.

2. That by said Act of the New Jersey Legislature of the fifth day of March, Eighteen hundred and thirty six it was enacted that on such navigable feeder or feeders, as by virtue of that act, or the act of the original incorporation of the Morris Canal and Banking Company may be constructed by the Canal Company, for the purpose of conducting into the Morris Canal the waters of Long Pond now known as Greenwood Lake or other waters that may be requisite for the supplying of the said Canal, the Canal Company was authorized to charge and receive the same rates of toll as were then lawful and chargeable upon the canal, and that in order to enable the Canal Company to procure the requisite lands and premises and construct the several basins, reservoirs and feeders authorized by the act of incorporation of the Canal Company and the amendments thereto, The Morris Canal and Banking Company was authorized to increase its capital stock to an amount not exceeding Six hundred thousand dollars ($600,000).

3. That shortly after the passage of said Acts of the New Jersey Legislature, the said The Morris Canal and Banking Company, did at large expense, by the construction of dams and feeders and the

diversion of waters from lakes, ponds and streams, take and appropriate and thereby acquire the right to take and continue to use the waters so appropriated; that included in the waters so taken and appropriated pursuant to the legislative authority before named
36 was the water that is now being used by the City of Newark in the quantities and amount set out in the complaint in this suit, and thereby the said The Morris Canal and Banking Company acquired from the State of New Jersey the right to use the waters so appropriated and diverted as aforesaid; that continuously thereafter the said The Morris Canal and Banking Company, having so acquired from the State of New Jersey the right to use said waters, continued to use and enjoy them in the maintenance and operation of said canal until the month of May, Eighteen hundred and seventy one; that on March fourteenth, Eighteen hundred and seventy one the legislature of New Jersey passed a further supplement to the charter of the Morris Canal and Banking Company known as Chapter CLIII of pamphlet laws of that year entitled "A Further Supplement to an Act to Incorporate a Company to Form an Artificial Navigation Between Passaic and Delaware Rivers,' passed December thirty first, Eighteen Hundred and twenty four, by the second section of which act it was made lawful for the Morris Canal and Banking Company or its lessee or lessees to use the surplus waters of the said Canal of said Company or any of its feeders, not needed for the purpose of navigation in furnishing and supplying the inhabitants of any City, Town or Village along the line of said canal or in the vicinity thereof with a sufficient quantity of pure and wholesome water for manufacturing or domestic or other uses, and to make contracts with corporate authorities of any such City, Town or Village or with individuals for said supply of water for such compensation as it may be mutually agreed upon and to erect said works and make such alterations in said canal as may be necessary or proper to enable said Company or its lessee or lessees to furnish such supply of water from the said Canal, and by the same Act The Morris Canal and Banking Company was authorized to lease the canal, together with all its boats, property and works, appurtenances and franchises to any person or persons or corporation either perpetually or for such short a time and upon such rates and agreements as may be agreed upon between the contracting parties; that in pursuance to the power contained in said act The Morris Canal and Banking Company on the fourth day of May, Eighteen hundred and seventy one executed and delivered to the Lehigh Valley Railroad Company a perpetual lease on the
37 entire canal and navigation works of the Canal Company as the same were then laid and constructed from the Delaware River at Phillipsburg to the Hudson River at Jersey City;

4. That on April 2, 1888, the New Jersey Legislature passed an act entitled, "An Act to authorize any of the municipal corporations of this State to contract for a supply, or a further or other supply of water therefor", known as Chapter CCL of the Pamphlet Laws of 1888, which authorized any municipal corporation of New Jersey to enter into a contract with any water company or other company for

a term of years for obtaining and furnishing of a supply, or a further or other supply of water to such municipal corporation for the purpose of extinguishing fires and for such other lawful uses and purposes as may be deemed necessary or convenient, provided that no such contract shall be made for a period longer than twenty-five years in any one term, and provided further that such contract may contain an option for the acquiring by such municipal corporation of the land, water and water rights for such supply on terms to be fixed in said contract.

5. That pursuant to said Chapter CCL of the State Laws of 1888, The City of Newark, being desirous of procuring for the present and future needs of the City of Newark a supply of pure and wholesome water for domestic purposes, the extinguishment of fires, and other lawful uses, entered into a contract in writing with the Lehigh Valley Railroad Company, a corporation of the State of Pennsylvania, and the East Jersey Water Company, a corporation organized under the general laws of the State of New Jersey, for the purpose of procuring for said The City of Newark such a supply of water for the sum of Six millions dollars ($6,000,000.)

6. That in aid of said contract and for the purpose of enabling the Lehigh Valley Railroad Company, and the East Jersey Water Company to perform their covenants in said contract contained, The Morris Canal and Banking Company united with The Lehigh Valley Railroad Company in the assignment and conveyance to the East Jersey Water Company of such water and water rights of the Pequannock Watershed, the Wynockie Watershed and the Ramapo Watershed as shall or may become necessary to enable the East
38 Jersey Water Company to perform its part of said contract with The City of Newark.

7. That immediately after the execution of said contract the East Jersey Water Company proceeded to locate, build and construct in one of the watersheds within the State of New Jersey, a tributary of the Passaic River, known as Pequannock Watershed, embracing lands within Morris, Passaic and Sussex Counties in this State, certain large reservoirs, and also a pipe line to conduct water therefrom to the distributing reservoirs of the City of Newark, and to make and construct works and buildings for this purpose and secure lands, water and water rights therefor.

8. That it was, among other things, agreed by the parties to said contract, that The City of Newark should have the right at anytime after the contract had been executed, and until within one year after the date of the final completion of all the works built and constructed to terminate that part of the contract which provided for the purchase of water by the City of Newark from the East Jersey Water Company by the million gallons, by exercising the option therein given and to become the owner absolutely in its own right of the lands, water, water rights, rights of way, dams and reservoirs and works constructed by the East Jersey Water Company for the purpose of said contract with all other appurtenances upon certain terms and

conditions therein expressed; that The City of Newark by resolution adopted by its Common Council October 11, 1889, approved by its Mayor October 15, 1889, and adopted by The Newark Aqueduct Board, November 6, 1889, exercised this option of purchase.

9. That in and by the fifth paragraph of the said contract, the East Jersey Water Company agreed that all the works necessary to be constructed, which should, be capable of delivering to The City of Newark fifty millions gallons per day for each and every day for all time, should be finished on or before May 1st, 1892, on and after which date all the water agreed to be furnished should be ready for delivery by gravity both at high service and low service to The City of Newark.

10. That the East Jersey Water Company on or about May 2, 1892, claiming that it had fully performed its contract and had provided works and buildings required by said contract, and had obtained and secured all the lands, water and water rights required therefor, and alleging its readiness and willingness to make title therefor and to convey and transfer the same to The City of Newark, requested that four million dollars of bonds of the City of Newark be delivered to it, or, if the City should so elect, four million dollars in current money of the United States be, paid to it in accordance with the ninth paragraph of said contract; that said contract also provided that upon making such payment, the East Jersey Water Company should immediately convey to the City of Newark, free and clear of the claims and demands of every person and persons whatsoever, the dams reservoirs, reservoir sites, conduit or conduits and all the works of every nature and kind built and constructed by the East Jersey Water Company as required by the terms of the said contract for the purpose of furnishing the supply of water therein contracted to be furnished by the East Jersey Water Company to the City, with all appurtenances, together with water and water rights sufficient to supply fifty million gallons of water daily forever, by good and sufficient conveyance in law, to invest the City with the title thereto absolutely.

39

11. That at the time such demand was made, the water furnished through this new source of water supply, and through the works constructed by the East Jersey Water Company had just been turned into the reservoirs of the City for use by the said City, but the City alleged that the works provided by the said Water Company had not been fully completed, and that the capacity of the said works to deliver fifty millions gallons per day was in fact inadequate and that the title to the property required for the purpose of the contract by the said Water Company had not been perfected and the City, therefore, refused to make such payment.

12. That the East Jersey Water Company desired to secure payment to it of part of the money, or the delivery to it of part of the bonds to be delivered to it upon the completion of its contract, and

the City desiring to use the water through the works then con-
40 structed, entered into a subsequent and supplemental contract on August 1, 1892.

13. That by virtue of the last mentioned contract, the City executed and delivered to the Water Company four millions of dollars of bonds, and deposited the bonds of a like character in the sum of two million dollars with the Fidelity and Title Company of the City of Newark, a trustee selected by the parties, to be held by the said Trustee and delivered to the Water Company at the time that the conditions mentioned in the said contract were fully performed on the part of the said Water Company, and that simultaneously with the making of the last mentioned contract and for the purpose of still further securing the City against any default of the performance of its obligations, the Water Company made and executed to the City a bond in the penal sum of Five Hundred thousand dollars and deposited with the trustee aforesaid Five hundred thousand dollars in bonds of the City of Newark, for the purpose of better securing to the City the performance by the Water Company of its obligations to complete and perfect title to the lands, water and water rights to which the City was entitled under original contract, and the payment of all claims or damages which might be made against the Water Company or the City of Newark in securing such lands, water and water rights, and that the pipe line or conduit which had been constructed by the Water Company for the purpose of conveying water to the said City should be found, when tested, sufficient to answer the requirements of the said contract:

14. That immediately upon the execution of said supplemental contract and bond the East Jersey Water Company made, executed and delivered to the City a deed of conveyance of the water and water rights, for the purpose of enabling it to fulfill and perform its covenants with the City, that said deed is dated as of May 2nd, 1892, and a true copy of the same as made and executed by the Water Company, and delivered to the said City, is annexed to this Answer and marked "Exhibit A," and made part hereof.

15. That after the payment by the City to the Water Company and the transfer to it of the title to certain water and water
41 rights by the Water Company and prior to May 1, 1896, it became apparent that the pipe line constructed by the Water Company was not of sufficient size to meet the requirements of the said contarct, and that it was impossible to convey and deliver by means of the construction then made, at the receiving reservoirs of the City of Newark, fifty million gallons water daily, and that the Company would be required in order to comply with the requirements of said contract, to enlarge the capacity of the said pipe line for the delivery of the said water, so that on or about May 1, 1896, the City of Newark entered into a further additional and supplemental contract with the Water Company.

16. That soon after the making of the last mentioned contract with the Water Company, the Water Company pursuant therewith proceeded to construct and lay down a second line of pipe from the Macopin Intake Reservoir located in the Pequannock Watershed, to the receiving reservoir at Belleville.

17. That at or about this time it became apparent that the capacity of the reservoirs built and constructed in the Watershed was insufficient to furnish to the City at all times, the daily supply of fifty millions gallons required by the aforesaid original contract, and that it would be necessary to impound therein a larger quantity of water than the reservoirs therein provided would contain. That the Water Company, during the year 1896, proceeded to build and construct within the Watershed and upon a branch of the said Pequannock River above the point at which the Oak Ridge Reservoir is located, at or near the village of Canistear, another large reservoir for impounding water, known as the Canistear Reservoir;"

18. That at or about the same time the Water Company obtained additional rights to lands covered by the waters of Echo Lake, and the lands surrounding the same, and constructed a diverting dam, thereby increasing the drainage area contributory to the said lake.

19. That as the City insisted that the capacity of the reservoirs located at Oak Ridge and Clinton, and of Macopin Intake at or near Smith's Mills, mentioned and described in the convey-
42 ance to the City of Newark by the Water Company, dated May 2, 1892 was wholly insufficient to regulate the flow of water and make diversion therefrom into the pipe lines in such quantity as to furnish a daily supply of fifty millions gallons forever, and that for this purpose it would be necessary for the City to have the control and the title to the Canistear Reservoir and the Echo Lake, the City of Newark by virtue of the seventeenth paragraph of its original contract with the East Jersey Water Company invoked the aid and authority of the New Jersey Court of Chancery to enforce the specific performance of the covenants and agreements contained in the said original contract and the deed from the Water Company to the City, dated May 2, 1892.

20. That as a result of said proceedings in the New Jersey Court of Chancery, in which the City was complainant and the East Jersey Water Company, the Morris Canal and Banking Company, and the Lehigh Valley Railroad Company were defendants, it was on September 24, 1900, ordered, adjudged and decreed by the Chancellor of the State of New Jersey, among things, that the

"said the Morris Canal and Banking Company and the Lehigh Valley Railroad Company have conveyed to the said The East Jersey Water Company by good and sufficient conveyance in the law, such water and water rights as they or either of them may have had in the said Pequannock Watershed at the date the said original contract was made, or so much thereof as will enable the said the East Jersey Water

Company to fulfill and keep and perform the said contract, dated September 24, 1889, hereinabove referred to, and have performed the covenants and conditions in such contract contained."

21. That the East Jersey Water Company in addition to the deed dated May 2, 1892 executed a conveyance to the City of Newark for a second conduit with the necessary right or way, pursuant to the supplemental contract with the City of Newark entered into May 1, 1896, which deed is dated September 15, 1900, and the East Jersey Water Company, and the West Milford Water Storage Company executed other conveyances to the City of Newark, for the lands covered by the waters and occupied by the dams and works of Canistear and Echo Lake Reservoirs, and in addition thereto lands near to or above the Macopin Intake Dam, to the amount of one thousand acres, which deeds are dated September 21, 1900:

43 22. That the Beattie Manufacturing Company, by deed dated January 10, 1895, delivered by the Water Company to the City, granted, bargained, sold and conveyed to the City the right from September 4, 1889, and forever thereafter, to divert and take out and from the Pequannock River at the Macopin Intake or at any other place or point along the line thereof above said Intake, such quantity of water as will enable the City to procure from said Watershed for all time, a supply not exceeding fifty million gallons of water daily, and that since the date of said deed of January 10, 1895, the Water Company had obtained from the Beattie Manufacturing Company the right as against it, to impound, divert and take all the remainder of the waters of the Pequannock River above the Macopin Intake Dam;

23. That the East Jersey Water Company and the West Milford Water Storage Company, the Society for the Establishment of Useful Manufactures, and the Dundee Water Power and Land Company, executed a deed to the City of Newark, granting as against them, their successors and assigns, the right and privilege irrevocably forever to the City of Newark, to impound, detain, divert, withdraw and use all the waters of the Pequannock River and its tributaries at the Macopin Intake, so called, of the Newark Water Works situated near Smith's Mills, in the County of Passaic, New Jersey, or at any point above said Intake, which last mentioned deed bears date September 21, 1900, and a true copy of the same as made and executed by the aforesaid grantors and delivered to the said City, is annexed to this answer and marked "Exhibit B," and made a part hereof:

24. That previous to the execution of said last mentioned deed, the East Jersey Water Company through conveyances of the said Society for the Establishment of Useful Manufactures, George F. Baker, the Dundee Water Power and Land Company, and the West Milford Water Storage Company, had acquired the right to divert the waters of the Pequannock River and its tributaries, at and above the Macopin Intake Dam, and the said several companies joined with the Water Company in said last mentioned deed, dated September

21, 1900, for the purpose of further assuring and confirming
44 to the City the right to impound, take, divert, withdraw and use all the waters of the Pequannock River and the tributaries above the Macopin Intake Dam.

25. The Water Company having also executed its grant to the City of Newark of its telephone lines errected along the route of the said pipe line by deed dated September 21, 1900, it was further ordered, adjudged, and decreed, by the aforesaid final decree, that by the above recited grants and such delivery of grants and possession and the payment by the City in cash and bonds there was a final fulfillment of the contracts between the Water Company and the City and a full discharge of the mutual obligations of the said contract, bond and agreements between the City and Water Company, and a full satisfaction of all claims, and demands of the City arising out of all contracts and dealings between the parties from the beginning of the world to the date of said final decree, viz., September 24, 1900, with reservations as to certain covenants contained in the deed of May 23, 1892, and the several deeds and grants delivered to the City pending said suit, and the covenants and undertakings of the Water Company with respect to defending the City free from molestation in the enjoyment of its water rights as against The Dundee Water Storage and Land Company, and its assigns by an instrument dated September 21, 1900:

26. That accordingly the City acquired the title to a supply of water from the Pequannock River and the possession of a completed plant, fully competent and capable of furnishing to the City of Newark fifty millions gallons of water per day forever, which is the same water for the consumption of which this action is brought; all of which was acquired prior to the passage of Chapter 252, Session Laws of 1907, creating the State Water Supply Commission of New Jersey, and therefore before the passage of said Act the City had the right granted by the State of New Jersey to divert, use and take a supply of water from the Pequannock watershed to the extent of fifty millions gallons daily, which is protected, conserved and sustained in Section 2 of Chapter 252 of the Laws of 1907.

45 *Second Separate Defense to Each of the Five Counts of the Amended Complaint.*

1. The provisions of Chapter 252, Sessions Laws of 1907, bar the plaintiff from recovery.

JEROME T. CONGLETON,
Corporation Counsel,
Attorney of Defendant.

EXHIBIT "A."

This indenture made this second day of May in the year eighteen hundred and ninety two, by and between the East Jersey Water Company, a corporation organized under the general laws of the State of

New Jersey, party of the first part, and the Mayor and Common Council of the City of Newark a municipal corporation of the same state, party of the second part,

Witnesseth: Whereas a certain contract and agreement was heretofore made and entered into bearing date the twenty-fourth day of September, in the year eighteen hundred and eighty nine, to which the several parties of this indenture were respectively parties, and having for its object the furnishing to the City of Newark a supply of pure and wholesome water for domestic purposes, the extinguishment of fires and other lawful uses, and the construction by the party thereto of the first part, of dams, reservoirs, conduits and works specially designed and constructed for the said water supply of the said City of Newark; as in and by the said contract and agreement is more fully specified and set forth, and will, reference being thereunto had, more fully appear:

And whereas, the entire water supply contracted for in and by the said contract and agreement, both for the high and low service therein and hereby provided for, has been taken from the Pequannock watershed alone, the said party hereto of the first part has heretofore planned designed and constructed certain dams, reservoirs, conduits and works with their necessary adjuncts, appliances and appurtenances, specially for the supply of such water, to the said City of Newark, in accordance with the terms and provisions of the said contract or agreement;

And whereas, the party hereto of the second part, hath
46 desired, in accordance with the terms and provisions in that regard of the said contract and agreement, to terminate that portion of the said contract or agreement which provides for the purchase of water by it, the said party hereto of the second part, from the said party hereto of the first part, by the million gallons, by exercising the option in such contract or agreement in such case given, and to become the owner absolutely in its own right of the lands, water, water-rights, dams, reservoirs and works constructed by the party hereto of the first part for the purpose of that contract, with all their appurtenances, upon the terms and conditions in that regard in the said contract or agreement specified and set forth; and hath manifested such option by a resolution passed by the Newark Aqueduct Board, and approved by the Common Council of the City of Newark, a certified copy of which has been heretofore, and on the —— day of —— delivered to the —— of the East Jersey Water Company the party hereto of the first part,

And whereas, upon the exercise of such option in the manner aforesaid, in accordance in that regard with the terms and provisions of the said contract or agreement, and upon the delivery of the said works, lands, water and water-rights by the said party of the second part under such option as in and by the said contract or agreement provided, the said party hereto of the second part, hath paid to the said party hereto of the first part, in the legally authorized and issued bonds of the said City of Newark the party hereto of the second part, bearing interest at the rate of four (4) per centum per annum, the sum of four million dollars ($4,000,000).

Now, therefore, this indenture witnesseth that upon the making of such payment as last aforesaid, at or before the ensealing and delivery of these presents, the receipt whereof is hereby acknowledged, and for and in consideration thereof, and of the further and additional but deferred payment of two million dollars ($2,000,000) to be made by the said party hereto of the second part to the said party hereto of the first part, its successors or assigns, on the twenty-
fourth day of September, in the year nineteen hundred, on
47 the terms and under the conditions specifically set out in an
agreement of even date herewith relating thereto, and of the covenants and stipulations on the part of the party hereto of the second part to be kept and performed as is hereinafter more particularly mentioned and specified, the party hereto of the first part hath given, granted, bargained, sold, aliened, released, enfeoffed, conveyed and confirmed and by these presents do give, grant, bargain, sell, alien, release, enfeoff, convey and confirm unto the said party hereto of the second part, its successors and assigns absolutely and forever;

All and singular the dams, reservoirs, lands and sites, conduit or conduits, and all and singular the works of every kind and nature, designed, built and constructed by the party hereto of the first part, as required by the terms of the said contract or agreement, for the purpose of furnishing the supply of water in the said contract or agreement contracted to be furnished by the party hereto of the first part, to the party hereto of the second part, with all and singular their appurtenances, adjuncts and appliances of whatever nature, kind or description soever, together with all and every the bridges, tunnels, embankments, stand-pipes, pressure regulators, gate-houses, gate-chambers, stop gates and valves, and whatever else has been furnished to ensure a proper and efficient delivery of the water into the reservoirs designated in the said contract or agreement; and all special or other pieces or castings, expension joints, man-holes, check valves, stop valves, air holes, blow-offs, waste pipes, and all and every other adjuncts and appliances and appurtenances required or furnished to make the said conduits suitable in every respect for the purpose intended; And also all and every the lands and rights of way over which the said conduit or conduits, pipe line or lines have been laid or constructed, and all and singular the lands and rights of way acquired, owned or possessed by the party hereto of the first part to give access to the said reservoirs or any of them, where the same are located;

Together with and also all and every so much of the water and water rights of the said Pequannock watershed as shall be sufficient
to supply fifty million gallons of said water daily, each and
48 every day forever; with the right to divert through the con-
duit or conduits so, or hereafter to be constructed, and the works with their adjuncts and appliances so, or hereafter to be built, and to use for the supply of said city with water for the purposes aforesaid up to the maximum quantity of such water in and by the said contract or agreement agreed to be furnished to said party hereto of the second part by the said party hereto of the first part; it being

full; understood that the said party hereto of the second part may supply with the said water not only the inhabitants within the present or any future corporate limits of the City of Newark, but also the inhabitants of the townships of Belleville, South Orange, and East Orange and Clinton as now organized and existing.

The intention of this instrument is to convey to and vest in the party hereto of the second part, absolutely all and every the lands and premises with the buildings, erections, structures, works, apparatus, adjuncts, appliances and appurtenances thereon and therein particularly mentioned and described in the schedule thereof hereto appended and made and declared to form and be a part hereof, reference being hereby made thereto for more particular descriptions of the same by metes and bounds; restricting nevertheless the conveyances hereby made of any of the water or water rights granted and conveyed to the maximum quantity of water to be supplied therefrom and thereby to the said party hereto of the second part mentioned and specified in the said contract and agreement.

Together with and also all and singular the ways, profits, privileges and advantages with the appurtenances to the same, or any thereof belonging or in any wise appertaining.

And also all the estate, right, title and interest, property claim and demand whatsoever of the said party of the first part, of, in and to the same, and of, in and to each and every part and parcel thereof.

To have and to hold all and singular, the above described land and premises, water and water-rights, with the appurtenances, unto the said party of the second part, its successors and assigns to the
49 only proper use, benefit and behoof of the said party of the second part, its successors and assigns forever, subject nevertheless to the license and agreement hereinafter particularly mentioned and set forth.

And the said party hereto of the first part, doth for itself, its successors and assigns, covenant, agree and grant to and with the said party hereto of the second part, its successors and assigns, that it, the said "The East Jersey Water Company," is the true, lawful and right- owner of all and singular the above mentioned and described land, premises, water, water-rights, buildings, structures, erections, works apparatus, adjuncts and appliances, and of every part and parcel thereof, with the appurtenances thereto belonging, And that the same, or any part or parcel thereof, at the time of the ensealing and delivery of these presents are not encumbered by any mortgage, judgment or limitation, or by any encumbrance whatever, by which the title of the said party hereto of the second part, hereby made, or intended to be made, for the same, can or may be changed, charged, altered or defeated in any manner whatsoever, excepting only the license and agreement hereinafter particularly mentioned and set forth. And also, that the said party of the first part now hath good right, full power and lawful authority, to grant bargain, sell and convey the said lands, premises, water, water rights, buildings, structures, erections, works, apparatus, adjuncts appliances and appurtenances and every part and parcel thereof; and also that

the said "The East Jersey Water Company," shall and will warrant, secure and forever defend the same and every part and parcel thereof, unto the said the "Mayor and Common Council of the City of Newark," their successors and assigns forever, against the lawful claims and demands of all and every person or persons, freely and clearly freed and discharged of and from all and all manner of claims or encumbrances whatsoever, excepting the license aforesaid.

And also, that the said works so built and constructed as hereinaforesaid do now conform, or shall be made to conform to the said contract or agreement hereinbefore first mentioned and referred to (but any suit to enforce performance or for an alleged breach
50 of this last mentioned covenant, shall however be brought within the time specified in the said last mentioned contract or agreement and not otherwise).

And the said party hereto of the first part, doth for itself, its successors and assigns, further covenant, agree and grant, to and with the said party hereto of the second part, its successors and assigns, that the said rights so secured, and the said works so constructed, hereby conveyed and delivered by the party of the first part to the party of the second part, are capable of delivering to the said City of Newark, and shall deliver to the said city pure and wholesome water, of the quantity agreed to be furnished and in the manner, and under the conditions prescribed and set forth in the said contract.

And the said party hereto of the first part, doth for itself, its successors and assigns further covenant, agree and grant to and with the said party hereto of the second part, its successors and assigns, that the said pipes, conduits reservoirs, dams and other works, and each of them have been so constructed properly and in the manner specified in said contract, and are of such strength as shall ensure safety to all property in the City of Newark, through, under or near to which the same are located; and that if, the said party hereto of the first part, shall and will indemnify and save harmless the said city and all individuals owning property therein from loss or damage thereto, and all persons injured while therein by an outbreak of said pipe, conduits, reservoirs, dams or other works, resulting from negligence or breach of contract by the party hereto of the first part, either in constructing or making the same not occasioned by the act of God, or the public enemy, or through contributory negligence of parties ag-rieved, the intent hereof being and the said party hereto of the first part hereby declares, that it will be responsible for all loss or damage arising from the fault of its erection, either in material or construction or in the maintenance thereof, to the same extent and in the same manner as it would or might be in law had it acquired its right of way otherwise than by the permission of said City; provided, however, that such liability shall not con-
51 tinue after the twenty fourth day of September, in the year nineteen hundred, when the injury complained of shall arise from the want of proper care or defect in maintenance.

And the party of the first part, doth for itself, its successors and assigns, hereby further covenant and agree to and with the said party of the second part, its successors and assigns, that it, the party

of the first part shall and will at any and all times hereafter, upon request, make execute and deliver to the said party of the second part, its successors and assigns, such other and further conveyance in the law, as may be found necessary for completing and perfecting the title of the said party, and every part and parcel thereof in the said party of the second part, its successors and assigns.

And the said party of the first part doth for itself, its successors and assigns, and also its grantors, the Lehigh Valley Railroad Company, and the Morris Canal and Banking Company, in consideration of the premises, further covenant, agree and grant to and with the said party hereto of the second part, its successors and assigns, that it will not, after the expiration of the period of eleven years, named in section eleven hereof, divert or take any water from the aforesaid watershed above the point of intake established for the said City of Newark, for the use of any other municipality or city, nor authorize any other person or persons or municipality or corporation, so to do.

And whereas, under and in pursuance of the terms and provisions of the said contract and agreement hereinabove first mentioned and referred to, the said party hereto of the second part, hath, upon the execution and delivery of this conveyance, become indebted unto the said party of the first part, in the further sum of two million dollars, the payment of which, however, by the agreement of the respective parties hereto, is to be deferred and shall be made as provided for in the collateral agreement relating thereto, hereinabove mentioned;

Now therefore, in consideration of such deferred payment, and of the maintenance of the works by the party hereto of the first part, until said last mentioned date as hereinafter provided and agreed,

it is agreed, between the party hereto of the first part and the
52 party hereto of the second part, that the party hereto of the first part, shall during all the period that shall elapse between the execution and delivery of this conveyance and the date specified for the final payment, have the right to divert, use, and for its own benefit, dispose of so much of the water conducted through the conduit or conduits and furnished by the works specially built and designed for the City of Newark, and hereby conveyed as the said City may not, during that time, need for its own use, for domestic purposes, for extinguishment of fires, and its other lawful uses, up to twenty seven million five hundred thousand gallons daily, and shall in any event have the right so to divert and use during all that period, all the water so conducted in excess of twenty seven million five hundred thousand gallons daily, with the right to connect with the pipe line and works so constructed and take the water therefrom as herein provided, at such point or points as the party hereto of the first part may desire; provided that if the said party hereto of the first part shall desire to make any connections with such pipe-line within the City of Newark, they shall be made at such point or points as the "Board of Street and Water Commissioners" of said city shall designate, and not otherwise; and shall also have the right to build and construct a pipe-line or lines crossing the pipe lines or conduits of the party of the second part, such crossing to be made

in such manner as not to injure or interfere with the works of the party of the second part.

Provided further, that the party hereto of the second part, shall, at all times, during said period have supplied to it for its own use as hereinbefore stated, both at high service and low service, so much water as it may need for its own use, up to a supply in all of twenty seven million five hundred thousand gallons for each and every day.

And it is further covenanted and agreed by and between the respective parties hereto, that during the period above specified, within which the party hereto of the first part, may divert and use for its own benefit the water so to be conducted through the works
53 specially designed and constructed for the supply of the City of Newark, and hereby conveyed as aforesaid, that it shall at its own cost and expense, keep and maintain all the said dams, reservoirs, conduits and works specially designed and constructed for the City of Newark and hereby enveyed or intended so to be, in good order and repair, and shall have such control over the same as may be necessary for any and all of the purposes herein mentioned and set forth, and shall deliver the same at the end of the said period to the party hereto of the second part in good order and repair, upon the payment of the last mentioned sum of two million dollars in the manner provided for in the said agreement relating thereto, and thereupon all the right and interest of the party hereto of the first part of, in and to the same and every part thereof and all control over the same, shall cease and determine, and the same shall thereafter be kept and maintained by the party hereto of the second part, nor shall said party hereto of the first part, be bound thereafter to preserve the purity of the water, provided however, that if the party hereto of the first part shall, under the terms of this agreement, lay any pipe or pipes in the streets, avenues or lands of the said city for the purpose of diverting water during the period allowed, the same shall at the end of such period become and be the property of said city.

And in consideration of the premises, and of the sum of one dollar and other sufficient value to it in hand paid, at or before the enscaling and delivery of these presents, the full receipt whereof is hereby acknowledged the said party hereto of the second part doth hereby, for itself, its successors and assigns, covenant, grant and agree to and with the said party hereto of the first part, its successors and assigns that the said bonds hereinbefore recited and mentioned as forming the consideration of this conveyance in the sum of four million dollars, have been and are legally authorized and issued, and are and shall be binding and valid obligations to the City of Newark under this conveyance, and that neither it, its successors and assigns, shall or will at any time or times whatsoever, supply any
54 public or private corporation or persons with any of the water delivered or furnished to or received by it, or them under or by virtue of this conveyance or purchase, for use outside of the present or any future corporate limits of the City of Newark, or the

limits of the townships of Belleville, South Orange, East Orange and Clinton, as now organized and existing.

In witness whereof the said party of the first part, "the East Jersey Water Company" has caused its corporate seal to be hereto affixed, and these presents to be signed by its Vice President the day and year first above written.

THE EAST JERSEY WATER COMPANY,
(Signed) HENRY S. DRINKER, [SEAL.]
Vice President.

Attest:

D. G. BAIRD,
Secretary.

Signed, sealed and delivered in the presence of

(Signed) E. L. PRICE.
J. J. McDAVITT.

STATE OF NEW JERSEY,
County of Essex, ss:

Be it remembered, that on the first day of August, eighteen hundred and ninety two, before me the subscriber a Master in Chancery of New Jersey, personally appeared David G. Baird, who being by me duly sworn does depose and make proof to my satisfaction that he is the Secretary of "The East Jersey Water Company" named in the foregoing indenture, that he well knows the corporate seal of the said "The East Jersey Water Company"; that the seal thereto affixed is the proper Corporate Seal of the said company; that the same was so affixed thereto, and said indenture signed and delivered by Henry S. Drinker, who was at the date and execution thereof, the Vice President of the said company, in the presence of deponent as the voluntary act and deed of the said company and that deponent thereupon signed the same as subscribing and attesting witness.

55

D. G. BAIRD.

Subscribed and sworn to before me this first day of August, A. D. 1862.

JOSEPH COULT,
Master in Chancery of New Jersey.

SCHEDULE.

Oak Ridge Reservoir (by metes and bounds).
Clinton Reservoir (by metes and bounds).
Macopin Intake (by metes and bounds).

Right of Way from Macopin Intake to Belleville Reservoir (by metes and bounds).

Right of Way, from Belleville Reservoir to South Orange Avenue Reservoir, (by metes and bounds).

The descriptions above given of the lands included in the foregoing deed of conveyance, The Oak Ridge Reservoir, The Clinton Reservoir, The Macopin Intake Reservoir, and the pipe line Right of Way from the last named reservoir to the Reservoirs of the City of Newark at Belleville, and on South Orange Avenue, are intended to conform to and describe the same lands and property shown and described upon certain maps of the same lands and property, made by the Engineers of the East Jersey Water Company, numbered from No. 1 to 23 inclusive, delivered herewith, and filed in the Office of the Comptroller of the said City of Newark, to which maps for greater certainty reference is hereby made.

Said descriptions and maps from the schedule referred to in the foregoing deed of conveyance, and form part thereof.

Signed for identification on behalf of the party of the first part:
JAMES SMITH, Jr.

Signed for identification on behalf of the party of the second part:

——— ———.

56 EXHIBIT "B."

This indenture made this twenty first day of September, A. D. 1900, between The East Jersey Water Company a corporation of New Jersey, The West Milford Water Storage Company, a corporation of said State, The Society for Establishing Useful Manufactures, a corporation of said State, and The Dundee Water Power and Land Company, a corporation of said State, parties of the first part, and the Mayor and Common Council of The City of Newark, a Municipal corporation of the said State, party of the second part, Witnesseth:

That the parties of the first part in consideration of One Dollar and other valuable consideration to them in hand paid, the receipt whereof is hereby acknowledged, have granted, remised, released and quit-claimed, and do hereby grant, remise, release and quit-claim unto the party of the second part, their successors and assigns forever, the right and privileges irrevocable forever as against the parties, of the first part, their successors and assigns, to impound, take, detain, divert, use and withdraw all the waters of the Pequannock River, and its tributaries at the Macopin Intake, so called, of the Newark Water Works situated near Smith's Mills in the County of Passaic, or at any point above said intake.

To have and to hold, the same unto the party of the second part, their successors and assigns forever.

In witness whereof, the parties of the first part have caused their respective common seals to be hereto affixed and duly attested and

these presents to be signed by their respective principal executive officers the day and year first above written.

THE EAST JERSEY WATER COMPANY,
By HENRY S. DRINKEN,
Vice President.

Attest:

ALBERT P. FISHER,
Secretary.

57 THE WEST MILFORD WATER STORAGE COMPANY,
By W. G. SNOW,
President.

Attest:

ALBERT P. FISHER,
Secretary.

THE SOCIETY FOR ESTABLISHING USEFUL MANUFACTURES,
By WM. BARBOUR,
Governor.

Attest:

RICHARD ROSSITER,
Secretary.

THE DUNDEE WATER POWER AND LAND COMPANY,
By WM. BARBOUR,
President.

Attest:

EDMUND LE B. GARDINER,
D. Secretary.

STATE OF NEW JERSEY,
County of Essex, ss:

On this 22nd day of September, A. D. 1900, before me the subscriber, a Master in Chancery of New Jersey, personally appeared Albert P. Fisher, who, being by me duly sworn, on his oath says: that he is the Secretary and Henry D. Drinker is the Vice President of the East Jersey Water Company, one of the corporations named in and who executed the foregoing Deed; that the seal affixed to said Deed is the common seal of said Company and was thereto affixed and the said Deed was signed and delivered by said Vice President in the presence of deponent and for the voluntary act and deed of said company in presence of deponent, who thereupon subscribed his name thereto as witness.

GEORGE T. VICKERS,
Master in Chancery of New Jersey.

58 STATE OF NEW YORK,
County of New York, ss:

On this 22nd day of September, A. D. 1900, before me the subscriber a Master in Chancery of New Jersey personally appeared Albert P. Fisher who, being by me duly sworn, on his oath says: that he is the secretary, and W. G. Snow is the president of The West Milford Water Storage Company, one of the corporations named in and who executed the foregoing deed; that the seal affixed to said deed is the common seal of said company, and was thereto affixed and the said deed was signed and delivered by said president in the presence of deponent as and for the voluntary act and deed of said company in the presence of deponent, who thereupon subscribed his name thereto as witness.

GEORGE T. VICKERS,
Master in Chancery of New Jersey.

STATE OF NEW YORK,
County of New York, ss:

On this 22nd day of September, A. D. 1900, before me a subscriber, a Master in Chancery of New Jersey, personally appeared Richard Rossiter, who, being by me duly sworn, on his oath says: that he is the Secretary and William Barbour is the Governor of The Society for Establishing Useful Manufactures one of the corporations name in and who executed the foregoing deed; that the seal affixed to said deed is the common seal of said company and was thereto affixed and the said deed was signed and delivered by said Governor in the presence of deponent as and for the voluntary act and deed of said company in presence of deponent, who thereupon subscribed his name thereto as witness.

GEORGE T. VICKERS,
Master in Chancery of New Jersey.

59 STATE OF NEW JERSEY,
County of Essex, ss:

On this 22nd day of September, A. D. 1900, before me the subscriber a Master in Chancery of New Jersey, personally appeared Edmund DeB Gardiner, who, being by me duly sworn, on his oath says; that he is the secretary and William Barbour is the president of the Dundee Water Power and Land Company one of the corporations named in and who executed the foregoing deed; that the seal affixed to said deed is the common seal of said company and was thereto affixed and the said deed was signed and delivered by said president in the presence of deponent as and for the voluntary act and deed of said company in presence of deponent, who thereupon subscribed his name thereto as witness.

GEORGE T. VICKERS,
Master in Chancery of New Jersey.

Deed of Water Right.

The East Jersey Water Company and Others

to

The Mayor and Common Council of the City of Newark.

Recorded —— —, ——.
Received in the clerk's office of the County of Passaic on the 25th day of September, A. D. 1900, at 2:10 o'clock, in the afternoon and recorded in Book R-14 of Deeds for said County, on pages 173 &c.

A. D. WINFIELD,
Clerk.

3782.

Received in the Clerk's Office of the County of Morris, New Jersey, on the twenty sixth day of December, 1901, at 10:54 o'clock A. M. and recorded in Book T 16 of Deeds for said County on pages 594 &c.

DANIEL S. VOORHEES,
Clerk.

60

4861.

Received in the Clerk's Office of the County of Sussex, New Jersey, on the 19th day of December, 1901, at 11 o'clock A. M., and recorded in Book W9 of Deeds for said county on page 14 &c.

O. C. SIMPSON,
Clerk.

(Filed Aug. 23, 1921.)

To the within-named defendant or Jerome T. Congleton, its Attorney:

Please take notice that on Thursday, the eighth day of September, A. D. nineteen hundred and twenty-one, at the hour of ten thirty o'clock in the forenoon, daylight saving time, or as soon thereafter as counsel can be heard, before his Honor, Thomas W. Trenchard, Justice of the Supreme Court, at the State House, in the City of Trenton, a motion will be made to determine the question of law raised in the first separate defense to each of the five counts of the amended complaint in the above entitled action; and at such time and place I shall move to strike out the said first separate defense to each of the five counts of the amended complaint, on the ground that the same does not disclose a legal defense to the complaint, in that Chapter 252 of the Laws of 1907 entitled "An Act to establish a State Water-Supply Commission, and to define its powers and duties, and the conditions under which waters of this State may be diverted," approved June 17, 1907, requires payment for diversion of water in excess of the amount fixed by said statute, and that the con-

struction of said statute, as contended for by the defendant, would render the same inefficacious.

That the rights of the defendant are not protected, conserved or sustained by Chapter 252 of the Laws of 1907, to divert water in excess of the amount fixed by statute without payment therefor.

That the provisions of Chapter 252 of the Laws of 1907 do not bar the plaintiff from recovery.

Yours respectfully,

THOMAS F. McCRAN,
Attorney General of New Jersey.
WILLIAM NEWCORN,
Assistant Attorney General.

Dated August 23, 1921.

(Filed Sep. 1, 1921.)

61 Application having been made on behalf of the plaintiff, and on due notice to the defendant, to determine the questions of law raised in the answer and the defenses of the defendant, in the above entitled action, and to strike out the first separate defense, interposed by the defendant to each of the five counts of the amended complaint, as recited in said notice, on the ground that the same did not disclose a legal defense to the complaint, and the court having heard the argument of counsel for the plaintiff and of counsel for the defendant thereon, and the court being of the opinion that the first separate defense so interposed, as aforsaid, should be struck out;

It is ordered that the said first separate defense, so interposed, should be struck out.

Let this order be entered in the minutes.

THOMAS W. TRENCHARD,
Justice of the Supreme Court.

Dated September 8th, 1921.

Entered September 8, 1921, on motion of

THOMAS F. McCRAN,
Attorney General,
Attorney of Plaintiff.

(Filed Sep. 8, 1921.)

This cause was tried before the Hon. Thomas W. Trenchard, Justice of the Supreme Court, by consent of the parties, without a jury, and the Court finds that there is due to the plaintiff from the defendant the sum of eighteen thousand one hundred four dollars and eight cents ($18,104.08) and judgment is rendered in favor of the plaintiff and against the defendant in the aforesaid sum of eighteen thousand one hundred four dollars and eight cents ($18,104.08) besides costs of suit.

Whereupon it is adjudged that the plaintiff State of New Jersey do recover of the defendant The City of Newark the sum of
62 eighteen thousand one hundred four dollars and eight cents damages and its costs which have been taxed at the sum of fifty dollars and sixty-six cents, making in the whole the sum of eighteen thousand, one hundred and fifty four dollars and seventy four cents.

Judgment entered September 8, 1921.

WM. S. GUMMERE,
C. J.

$18,104.08
50.66

$18,154.74

63 I, Enoch L. Johnson, Clerk of the Supreme Court of the State of New Jersey, do certify that the foregoing is a true copy of the notice of appeal and also a copy of the judgment entered in the above stated cause as the same remains on file and of record in my office.

In testimony whereof I have set my hand and the seal of said Court at Trenton, this third day of November A. D. nineteen hundred and twenty-one.

[SEAL.] ENOCH L. JOHNSON,
Clerk.

64 New Jersey Supreme Court.

STATE OF NEW JERSEY, Plaintiff-Appellee,

vs.

CITY OF NEWARK, Defendant-Appellant.

On Appeal.

Remittitur.

It appearing by the remittitur now here returned from the Court of Errors and Appeals that the Judgment of this Court removed by appeal in the above entitled cause, was in and by said Court of Errors and Appeals, affirmed, with costs,

It is Ordered that said remittitur be filed and that said cause be proceeded with according to law.

Entered March 23, 1922, on motion of

WILLIAM NEWCORN,
Assistant Attorney General,
Counsel of Appellee.

65 New Jersey Court of Errors and Appeals, November Term, 1921.

Nos. 85-86.

STATE OF NEW JERSEY

vs.

THE CITY OF TRENTON.

THE STATE OF NEW JERSEY

vs.

THE CITY OF NEWARK.

Argued November Term, 1921. Decided March Term, 1922.

Thomas F. McCran,
Attorney General;
William Newcorn,
Asst. Attorney General,
For the State.
Charles F. Bird,
For City of Trenton;
Jerome T. Congleton,
Joseph G. Wolber,
For City of Newark;
Robert H. McCarter,
Counsel for defendants.

The opinion of the court was delivered by MINTURN, *J.*:

For many years, the Cities of Trenton and Newark had been obtaining their water supply from the Delaware and Pequannock water sheds, respectively, under various legislative grants for that purpose.

An act general in its scope, designed by the legislature for that specific purpose, and evidencing a liberal legislative public
66 policy was passed in 1888, entitled "An Act to authorize any of the municipal corporations of this State to contract for a supply, or a further or other supply of water therefor." (Chap. 250 L. 1888.)

In that situation the legislature passed Chapter 252 of the Laws of 1907, entitled "An Act to establish a Water Supply Commission, and to define its powers and duties, and the conditions under which waters of this State may be diverted." These two enactments serve to mark the parting of the ways between the legislative conception of the old order, and the new; between a public policy which left the appropriation of the public domain to the haphazard necessities

of sporadic local interests, and a State wide policy of conservation and distribution.

Under the provisions of the act of 1907, a commission was appointed by the Governor, charged with supervision over all the sources of potable and public water supply, "to the end that the same may be economically and prudently developed for the use of the people of the State."

In furtherance of that general policy, the second section of the act inhibits any municipal corporation or others engaged in purveying water or "proposing to supply the inhabitants of any municipal corporation with water," from condemning lands or water," for any new or additional source of water supply, or to divert water from such new or additional source, until such municipal corporation or person had first submitted descriptions thereof, which may be accompanied by maps and plans to said Commission, and until said Commission shall have approved the same."

To this legislative mandate is super-added, a proviso that the act shall not affect water works already in process of con-
67 struction, provided the plans of construction .be submitted within ninety days after the approval of the act; and the section concludes with this significant provision: "Nothing in this act contained shall be construed to take from any municipality in this State the right to use and take all the water which it has the right to use or appropriate by purchase or condemnation."

This provision of course must be read in conjunction with the other provisions, as well as the title of the act, which evince a general legislative policy of imposing a license fee for the use of water in futuro; of conserving its use and of dealing with "new or additional sources of water supply," upon a regulative basis.

In consonance with this general legislative conception, the eighth section of the act provides, "Every municipality, corporation or private person, now diverting the waters of streams or lakes with outlets, for the purpose of a public water supply, shall make annual payments on the first day of May, to the State Treasurer, for all such water hereafter diverted in excess of the amount now being legally diverted; provided however, no payment shall be required until such legal diversion shall exceed a total amount equal to one hundred gallons daily per capita, for each inhabitant of the municipality or municipalities supplied, as shown by the census of 1905. Such payment shall be deemed to be a license and its amount shall be fixed by said commission, at a rate of not less than one dollar or more than ten dollars per million gallons." In default of payment of the fee to the State Treasurer, of the aggregate amounts collectible, the State Comptroller is directed to collect the
68 same; and in case of failure to collect, he is directed to certify the amounts due to the Attorney General, for collection, who is thereby authorized "to take immediate steps to collect the same in the name of the State." Such departmental action having been taken in the cases of these two municipalities, the Attorney

General instituted the necessary actions in the Supreme Court, and obtained judgments thereon.

The City of Trenton interposed three distinct defences, and the City of Newark interposed but one, the substance of which was a denial of the State's power to exact the fee. On motion these defences were struck out following the determination of this Court in State v. Jersey City, 94 L. 431, 111 Atl. 544, upon the ground that the answers contained no legal defence to the actions. From that judicial action this appeal has been taken.

The facts are not in dispute. It is conceded that the City of Trenton at the time of the enactment of the act of 1907 was taken from the Delaware River daily 14,200,000 gallons of water for local use, and that the City of Newark was daily extracting from the Pequannock River 36,241,666 gallons for local use.

These diversions represent the ante-statutory flowage, and are considered by the State under the 8th section of the act of 1907 to be non-taxable. No dispute exists as to the quantum of water extracted, or as to the amount due therefor, if the essential proposition involving the legal right of the State to impose the license fee be legally vindicated.

The defendants in effect deny the power of the State to interfere with their present contractual status, as an interference with
69 vested rights acquired by them as proprietary owners, and not as political sub-divisions of the State. Thus their brief declares "It is difficult to comprehend how in view of the foregoing cases, it can be claimed, that the State has not to the extent here claimed, denuded itself of any right in, or dominion over the waters which are the subject matter of these suits"; and again, "Any diminution of the right conveyed is a taking thereof in derogation of the grant, and to that extent the act of 1907 is unconstitutional."

This contention presents a misconception, as in no sense does the act in question contemplate a deprivation of an existing contractual or property right, but on the contrary, it expressly assumes the right of these defendants to extract water from their respective sources of supply, and imposes no tax thereon. It also assumes their right to continue to extract water from such sources as the demands of their populations, and local exigencies may require.

The effect of this legislative policy therefore is, that nothing is taken from them in the way of property right, or freedom of future action, in the execution of the powers conferred upon them.

Such in effect was the construction put upon the act by Mr. Justice Bergen, speaking for the Supreme Court, in East Jersey Water Co. v. Board of Conservation Etc. 91 L. 448.

The legislature assumed the right of the defendants to extract water free of a license fee, upon a basis practically of present consumption; and thereafter and beyond that limitation, it placed them and all future purveyors of water upon the same basis, by the requirement of a license fee. This situation simply presents the inquiry whether the State may exert its police power for the
70 purpose of conserving the public property in the interest of the common weal; for as was remarked by Mr. Justice Pitney,

speaking for this Court in McCarter, Atty Genl. vs. Hudson County Water Co. 70 Eq. 695, and substantially repeated by Mr. Justice Holmes, in the same case in 209 U. S. 349, "The regulation of the use and disposal of such waters therefore, if it be within the powers of the State, is among the most important objects of government." Such was the legislative purpose, as we conceive it, in the provisions of the act of 1907,—a regulation of the use, by the interposition of the police power, in the interest of conservation and development. The fact that in the exercise of this power, men and corporations may be hampered and inconvenienced in the use or employment of their properties, presents no legal or constitutional barrier to its enforcement.

Slaughter House Cases, 16 Wall U. S. 36.
Mugler v. Kansas, 123 U. S. 623.
Reetz v. Michigan, 188 U. S. 505.
California Co. v. Reduction Co. 199 U. S. 306.

As was declared by Mr. Justice Magie, speaking for the Supreme Court in State v. Wheeler, 44 L. 91, in a case involving the construction of an act, designed to protect the waters, creeks, and ponds of the State from pollution; "The design of the act is not to take property for public use, nor does it do so within the meaning of the constitution. It is intended to restrain and regulate the use of private property, so as to protect the common right of all the citizens of the State. Such acts are plainly within the police power of the legislature, which power is the mere application to the whole community of the maxim Sic utere tuo ut alienum non laedas. Nor
71 does such a restraint, although it may interfere with the profitable use of property, by its owner, make it an appropriation to a public use, so as to entitle him to compensation," citing.

Com. v. Alger, 5 Cush. (Mass) 53.
Com. v. Tewkesbury, 11 Met. (Mass) 55.

But the logical, and as it seems to us, conclusive answer to the defendants' contention, is that they are not only subsidiary political divisions of the State, exercising their delegated powers presumably and exclusively in the public interest, but ex necessitate their business and property are thereby expressly affected with a public interest; and under well settled rules of law, become thereby subject to the exercise of the police power when exerted by the State in behalf of the general body politic. This doctrine was promulgated by the United States Supreme Court in 1876 in Munn v. Illinois, 94 U. S. 113, and it has been consistently and repeatedly followed in subsequent adjudications, in that court, and in the States generally, until the principle has now been placed beyond the pale of controversy.

The principle there laid down was that "Property does become clothed with a public interest, when used in a manner to make it of public consequence, and affect the community at large. When therefore one devotes his property to a use in which the public has an interest, he in effect grants to the public an interest in that use,

and must submit to be controlled by the public, for the common good, to the ebtent of the interest he has thus created."

Mr. Justice Bradley reiterated this view in a dissenting
72 opinion in the Sinking Fund cases, 99 U. S. 700, wherein he observes; "When an employment or business becomes a practical monopoly to which the citizen is compelled to resort, and by means of which a tribute can be exacted from the community, it is subject to regulation by the legislative power."

To the same effect are:

Budd v. New York, 143 U. S. 517.
Brass v. Sloesser, 153 U. S. 391.
Cotting v. Kansas City, 183 U. S. 79.
Cooley Const. Lim. 734.

The principle has been applied to companies supplying water and gas.

Spring Valley Water Works v. Schottler, 110 U. S. 347.
San Diego Land Co. v. National City, 174 U. S. 739.
Mobile v. Brenville Water Co. 130 Ala. 799.

Many of these adjudications have extended the exercise of the police power to the regulation of rates and charges for water consumed, as in the Granger cases.

Chicago, etc., R. R. v. Iowa, 94 U. S. 155.

Subsequent adjudications have modified the exclusive and uncontrolled power of the legislature, in that regard, to the extent of declaring that the rates fixed by legislation must be reasonable, and to that end must be subject to judicial review.

Railroad Commission cases, 116 U. S. 307.
Smith v. Anes, 169 U. S. 466.

Under the general power of regulation in the public interest, existing public and quasi public corporations, like foreign and domestic insurance and warehouse companies, and miscellaneous cor-
73 porations of a quasi public character, have been subjected by legislation to the payment of license fees and general regulatory requirements.

Cargill v. Minnesota, 174 U. S. 96.
Carroll v. Greenwich Ins. Co., 199 U. S.
Fidelity Assn. v. Mettler, 185 U. S. 308.

The summation of the doctrine is contained in the statement that, "The State under its power to enact laws for the general welfare of its people, may pass laws designed to increase the industries of the State, develop its resources, and add to its wealth; for instance laws forbidding any waste of natural gas or water which would be detrimental to the public as distinguished from an injury to an individual."

6 R. C. L. 212 and cases cited.
Smith v. Texas, 233 U. S. 630.

A practical application of this principle is notably evinced in People v. Beakes Dairy Co. 222 N. Y. 416, where it is declared that "The State may to some extent compel honesty, by imposing a license fee, if wide spread frauds upon and losses are thereby prevented. Any trade, calling or occupation may be reasonably regulated if the general nature of the business is such, that unless regulated many persons may be exposed to misfortunes against which the legislature can properly protect them."

As the possession of the greater includes the lesser power, a fortiori the power to regulate charges, rates and general conditions must also carry the power to license for the prosecution of business in futuro, by a public agency, performing a public function as the delegated agent or arm of the State.

74 It is unnecessary therefore to determine for the purposes of this case, the extent to which the State may exert its power in the general public interest, as between what the defendants allege to be the private or property rights of the municipalities, and their political characteristics. It is enough for present purposes to affirm the right of the State to regulate in the public interest, the use of an indispensable natural commodity, committed by society to its care, development and conservation, by the imposition of a reasonable regulatory fee for the use only in futuro, by the body politic or public agency, whose unrestricted operation may result in segregating for local use entirely, the common property of the people. Such a regulation is in no legal sense a taking of private property, or a violation of any contractual right, but rather a regulation of the use of a common commodity by local public agencies, in the general interest of the entire community.

These views lead to an affirmance of the judgment.

75 [Endorsed:] Nos. 85-86, November Term 1921. N. J. Court of Errors & Appeals. State of New Jersey vs. The City of Trenton. State of New Jersey vs. The City of Newark. Opinion, Minturn, J. Filed Mar. 6, 1922. Thomas F. Martin, Clerk.

76 State of New Jersey,

[Vignette.]

Department of State.

I, Thomas F. Martin, Secretary of State of the State of New Jersey, and ex-officio Clerk of the Court of Errors and Appeals in the last resort in all causes, do hereby Certify that the foregoing is a true copy of an opinion read by said Court in the above-stated cause, November Term, 1921, as the same is taken from and compared with the original now remaining on file in my office

In testimony whereof, I have hereunto set my hand and affixed my Official Seal at Trenton, this Twelfth day of June, A. D. 1922.

[Seal of the Secretary of State of New Jersey.]

T. F. MARTIN,
Secretary of State.

[Endorsed:] New Jersey Court of Errors and Appeals, November Term, 1921. Between State of New Jersey v. The City of Trenton. The State of New Jersey v. The City of Newark. Opinion. Filed June 13, 1922. Enoch L. Johnson, Clerk.

77 [Vignette.]

New Jersey Supreme Court.

In obedience to the commands of the within Writ, I herewith transmit to the Supreme Court of the United States, a duly certified transcript of the complete record and proceedings in the within entitled cause, with all things concerning the same.

Witness, My hand and the seal of the Supreme Court this eighth day of June, A. D. Nineteen hundred and twenty-two.

[Seal of the Supreme Court.]

ENOCH L. JOHNSON,
Clerk.

78 [Endorsed:] New Jersey Supreme Court. State of New Jersey, Defendant in Error, vs. The City of Newark, Plaintiff in Error. Copy of Judgment &c. Jerome T. Congleton, Attorney of Plaintiff in Error. Thomas F. McCran, Attorney General, Attorney of Defendant in Error. Clerk's office, Trenton. $11.47.

Endorsed on cover: File No. 29,019. New Jersey Supreme Court. Term No. 469. The City of Newark, plaintiff in error, vs. The State of New Jersey. Filed July 6th, 1922. File No. 29,019.

IN THE

Supreme Court of the United States

October Term, 1922, No. 469

THE CITY OF NEWARK,
Plaintiff-in-Error,

vs.

THE STATE OF NEW JERSEY,
Defendant-in-Error.

BRIEF ON BEHALF OF PLAINTIFF-IN-ERROR

JEROME T. CONGLETON,
Corporation Counsel of
The City of Newark,
Plaintiff-in-Error.

GEORGE W. WICKERSHAM,
of Counsel.

INGLE, INC., 165 William Street, New York City

INDEX

Table of Cases Cited.

IN THE

Supreme Court of the United States

October Term, 1922.

No. 469.

THE CITY OF NEWARK, *Plaintiff-in-Error,*

vs.

THE STATE OF NEW JERSEY, *Defendant-in-Error.*

BRIEF ON BEHALF OF THE PLAINTIFF-IN-ERROR.

Statement.

The case comes up on a writ of error to the Supreme Court of the State of New Jersey. The action was begun at law by the State of New Jersey to recover from the City of Newark a license tax claimed to be due from the City for the years ending June 30, 1915; December 31, 1917; December 31, 1918; December 31, 1919, and December 31, 1920, pursuant to the provisions of Chapter 252 of the Laws of 1907 of the State of New Jersey entitled "An Act to establish a State Water Supply Commission, and to define its powers and duties, and the conditions under which waters of this State may be diverted" (set forth in full *infra,* p. 13). Section 8 of this Act provides that every municipality, corporation or private person diverting waters for public water supply shall make annual payments to the State "for all such water hereafter diverted in excess of the amount now being legally diverted." The complaint of the State

(Rec., p. 15) alleged (paragraph 3) that the City was under the provisions of this Act "permitted to divert * * * an average daily free allowance of water to the amount of 36,241,666 gallons, said last mentioned amount being the amount of water which was being diverted by said municipality on June 17th [1907], aforesaid, the date when the act aforesaid became effective and operative" (Rec., p. 16); and claimed for each of the years mentioned a license fee of $1.00 per million gallons for the excess of the average daily diversion of water for the respective years over the 36,241,666 gallons which the City used on the day when the Act went into effect.

The City in its answer set up a separate defense (Rec., p. 23) alleging that the State had, by an act of December 31, 1824, and certain supplements thereto, granted to the Morris Canal & Banking Company the right to use certain waters of the City for the purposes of artificial navigation; that the company had diverted waters and constructed a canal and certain reservoirs which, by the Act of March 14, 1871, it was authorized to lease perpetually; that the company leased its works to the Lehigh Valley Railroad Company on May 4, 1871. The separate defense further alleged that by Chapter CCL of the Laws of 1888 the State authorized any municipal corporation of the State of New Jersey to obtain a public water supply by lease from any water company, with an option to purchase the land, water and water rights for such supply; that pursuant thereto, the City of Newark contracted with the Lehigh Valley Railroad Company and the East Jersey Water Company for a supply of 50,000,000 gallons of water daily. The contract contained an option to purchase by the City, which option was later exercised; thereupon the reservoirs were enlarged and $6,000,000 paid by the City of Newark for water rights and a plant fully competent and capable of furnishing to it 50,000,000 gallons of water per day for-

ever; and that this plant was acquired prior to the passage of the Act of 1907 in question.

The City also pleaded as a second defense that the provisions of the Act of 1907 itself barred recovery (Rec., p. 30).

A jury trial was waived and the Supreme Court struck out on motion of the State the separate defenses of the City of Newark and entered judgment for $18,104.08, the full amount claimed. This judgment was affirmed by the Court of Errors and Appeals, although the City argued that the construction of the law claimed by the State would violate the City's rights under the Constitution of the United States. The specific holding of the Court of Errors was that the statute was regulatory, and that the results of its operation, though a taking of private property, were nevertheless not within the condemnation of the Fourteenth Amendment, because the property was affected with a public use and the legislation was designed for the promotion of the public welfare (Rec., p. 49). The federal rights having been insisted upon and argued in both the Supreme Court and the Court of Errors and Appeals (Rec., p. 7) and denied by both courts, a writ of error was allowed by the Chancellor (Rec., p. 8).

In short, the constitutional point was raised with a degree of explicitness fairly within the rule in *Bridge Proprietors* v. *Hoboken Co.*, 1 Wallace, 116, 120, 142, and was consistently set up and claimed at every opportunity.

Assignment of Errors.

The first assignment of error and the one which is urged here is that the Court of Errors and Appeals erred in holding the Act of 1907 constitutional and not violative of the City's rights under the Fourteenth Amendment.

ARGUMENT.

The Act of 1907 as construed violates the City's rights under the Fourteenth Amendment, and denies it the equal protection of the laws.

The sole question for determination by this Court is whether the so-called "license tax" imposed by Chapter 252 of the Laws of 1907 of the State of New Jersey as construed by the highest court of the State violates the City's constitutional rights.

Section 8 of the statute in question provides, in part:

> "Every municipality, corporation or private person now diverting the waters of streams or lakes with outlets for the purpose of a public water-supply shall make annual payments on the first day of May to the State Treasurer for all such water hereafter diverted in excess of the amount now being legally diverted; * * *"

The highest court of the State of New Jersey has in this case construed the words "now being legally diverted" to mean the amount which was actually diverted on the day when the Act went into effect, viz: June 17, 1907. On that day, had the City of Newark flowed into its mains the entire 50,000,000 gallons which its plant, acquired by State authority, was capable of producing and which might therefore have been "legally diverted," the tax assessed would have been levied, according to the construction of the New Jersey Court, only upon the excess of the City's daily diversion thereafter over such 50,000,000 gallons, and as the complaint shows, there would have been no tax. As it was, it happened that on that day the City did not fully open the gates for its supply and diverted during that particular twenty-four hours only 36,241,666 gallons. According to the construction adopted, this purely accidental figure will for all time be the basis of the assessment of the tax upon the City of Newark.

A mere statement of the case seems to demonstrate that this arbitrary and capricious method of assessment denies to the City of Newark the equal protection of the laws. Cities less populous by one-half than Newark but owning plants with a capacity far in excess of their needs might have diverted on June 17, 1907, twice the amount of water which the City of Newark diverted, and a city twice as large might have diverted half as much. And yet the former of such cities would thereby have procured an almost perpetual exemption from the tax, and the latter would have brought on itself an insupportable burden of indefinite duration. It is obvious that only by an extraordinary operation of the laws of chance could any two cities or persons similarly situated have diverted an amount on that particular day fairly commensurate with their populations or patronage and neither an unduly small nor an unduly large amount. Yet the statute's inevitable operation is to penalize the economical city and reward the extravagant. Disproportionate taxation could hardly be more palpably exemplified than by such results, for the diversion on June 17, 1907, fixes forever the amount which may be used without tax.

Accidents of climate on the critical date, June 17, 1907, are factors accorded by the statute an enduring effect. Suppose the day was oppressively hot in Jersey City and cool at Camden, ninety miles away. Jersey City would by its additional use of water probably avoid the tax altogether, and Camden, unless visited with some other fortuitous occurrence, would pay forever a heavy tax.

Conflagrations, too, enter into the operation of the tax. Had some stubborn fire requiring the pumping of water for hours broken out in Trenton on that day, and no fires of any size in New Brunswick, the accident of the fire would have given Trenton a perpetual exemption and left New Brunswick with a far heavier *per capita* tax than the capital of the State.

Moreover, breaks in mains on June 17, 1907, would have proved, and such as did occur did prove, a blessing without parallel. Further examples of the manner in which fortuitous events fix the amount of this tax will at once suggest themselves.

The general principles relating to the application of the Fourteenth Amendment have been many times stated by this Court. In *Connolly* v. *Union Sewer Pipe Co.*, 184 U. S., 540 (1901), they were set forth as follows (pp. 558-560):

> "What may be regarded as a denial of the equal protection of the laws is a question not always easily determined, as the decisions of this court and of the highest courts of the States will show. It is sometimes difficult to show that a state enactment, having its source in a power not controverted, infringes rights protected by the National Constitution. No rule can be formulated that will cover every case. But upon this general question we have said that the guarantee of the equal protection of the laws means 'that no person or class of persons shall be denied the same protection of the laws which is enjoyed by other persons or other classes in the same place and in like circumstances.' *Missouri* v. *Lewis*, 101 U. S. 22, 31. We have also said: 'The Fourteenth Amendment, in declaring that no State "shall deprive any person of life, liberty or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws," undoubtedly intended not only that there should be no arbitrary deprivation of life or liberty, or arbitrary spoliation of property, but that equal protection and security should be given to all under like circumstances in the enjoyment of their personal and civil rights; that all persons should be equally entitled to pursue their happiness and acquire and enjoy property; that they should have like access to the courts of the country for the protection of their persons and property, the prevention and redress of wrongs, and

> the enforcement of contracts; that no impediment should be interposed to the pursuits of anyone except as applied to the same pursuits by others under like circumstances; that no greater burdens should be laid upon one than are laid upon others in the same calling and condition, and that in the administration of criminal justice no different or higher punishment should be imposed upon one than such as is prescribed to all for like offenses.' *Barbier* v. *Connolly*, 113 U. S. 27, 31. This language was cited with approval in *Yick Wo* v. *Hopkins*, 118 U. S., 356, 369, in which it was also said that 'the equal protection of the laws is a pledge of the protection of equal laws.' In *Hayes* v. *Missouri*, 120 U. S., 68, 71, we said that the Fourteenth Amendment required that all persons subject to legislation limited as to the objects to which it is directed, or by the territory within which it is to operate, 'shall be treated alike, under like circumstances and considerations, both in the privileges conferred, and in the limitations imposed.' 'Due process of law and the equal protection of the laws,' this court has said, 'are secured, if the laws operate on all alike, and do not subject the individual to an arbitrary exercise of the powers of government.' *Duncan* v. *Missouri*, 152 U. S., 377, 382. Many other cases in this court are to the like effect."

In *Gast Realty and Investment Company* v. *Schneider Granite Company*, 240 U. S., 55 (1916), Mr. Justice HOLMES said, in holding unconstitutional an ordinance of the City of St. Louis regulating the levying of a sewer assessment (p. 59):

> " * * * if the law is of such a character that there is no reasonable presumption that substantial justice generally will be done, but the probability is that the parties will be taxed disproportionately to each other and to the benefit conferred the law cannot stand against the complaint of one so taxed in fact. * * * *The differences were not based upon any consideration of difference in the*

> *benefits conferred but were established mechanically in obedience to the criteria that the charter directed to be applied.* The defendants' case is not an incidental result of a rule that as a whole and on the average may be expected to work well, but of an ordinance that is a farrago of irrational irregularities throughout." (Italics ours.)

See also:

> *Kansas City So. Ry.* v. *Road Imp. Dist. No. 6,* 256 U. S., 658;
> *Bell's Gap R. R. Co.* v. *Pennsylvania,* 134 U. S., 232, 237;
> *Cotting* v. *Kansas City Stock Yards Co.,* 183 U. S., 79, 112;
> *Gulf, Colorado & Santa Fe Ry.* v. *Ellis,* 165 U. S., 150, 165;
> *Magoun* v. *Illinois Trust & Savings Bank,* 170 U. S., 283, 294;
> *Nicol* v. *Ames,* 173 U. S., 509, 522;
> *Yick Wo* v. *Hopkins,* 118 U. S., 356;
> *Royster Guano Co.* v. *Virginia,* 253 U. S., 412, 415.

See also *Truax* v. *Corrigan,* 257 U. S., 312, 337-338 (1921), where the Court said:

> "Classification * * * must regard real resemblances and real differences between things, and persons, and class them in accordance with their pertinence to the purpose in hand."

An interesting example of the attitude of this Court toward a statute fixing an arbitrary date as a basis for taxation is found in the construction of the Income Tax Law of 1916 (39 Stat., 758). Sec. 2 (*c*) of this law fixed the value of personal property on March 1, 1913, as the

basis for determining gain or loss from sales. This clause was invalidated with the concurrence of the Solicitor General in *Goodrich* v. *Edwards*, 255 U. S., 527, 535, the Court holding that the statute did not fix the true basis of ascertaining gain or loss.

In *People ex rel. Farrington* v. *Mensching*, 187 N. Y., 8, the Court of Appeals of New York held invalid a stock transfer tax law of New York which based the tax upon the number of shares sold regardless of face value. The Court said of this Act (p. 17):

> "The act now before us does not classify by arranging according to quality, *but by arranging according to accident* * * * [italics ours].
>
> "The statute breaks into the class, and with eyes shut strikes some and lets others go. The rule governing the subject, as laid down by the Supreme Court of the United States, is that there must be 'some difference which bears a reasonable and proper relation to the attempted classification.' It cannot be 'mere arbitrary selection'." (p. 21; citing many cases.)

The Supreme Court of the State of New Jersey itself held invalid a tax levied upon all those taxable inhabitants of a school district who had not paid a tax assessment in 1871. *State ex rel. Trustees* v. *Township Committee*, 36 N. J. L., 66. The New Jersey Court said in that case (p. 70):

> "When the amount levied upon individuals is determined without regard to the amount or value exacted from any other individual, or classes of individuals, the power exercised is not that of taxation but of eminent domain. * * * The process is one of confiscation and not of taxation."

In *Matter of City of New York*, 190 N. Y., 350 (1907), a provision of the New York City charter was held unconstitutional which provided for the acquisition of

lands for waterfront improvements and authorized the setting off of benefits against awards. The Chief Judge quoted from *Connolly* v. *Union Sewer Pipe Co., supra,* as follows (p. 361):

> "Arbitrary selection can never be justified by calling it classification. The equal protection commanded by the Fourteenth Amendment forbids this."

and continued:

> "Treated as an exercise of the power of taxation, it would be difficult to imagine a selection for taxation, both as to persons to be taxed and the amount of the tax, more arbitrary and capricious than the statutory provision before us. *Liability to and amount of tax is left to pure accident, which can have no just relation to the subject.*" (Italics ours.)

The statute as construed creates a conclusive presumption that all municipalities, corporations and private persons in the State of New Jersey were from midnight of June 16, 1907, to midnight of June 17, 1907, diverting precisely the amounts of water which each needed or had the right to divert. It is inconceivable that the amounts used by any two cities or persons on that day could have any but a chance relation to each other or to the respective rights to divert. It cannot be presumed that all water used in excess of the amount used on that day is a benefit. As Mr. Justice LURTON said in *Mobile J. & K. C. R. R. Co.* v. *Turnipseed,* 219 U. S., 35 (1910), at page 43:

> "That a legislative presumption of one fact from evidence of another may not constitute a denial of due process of law or a denial of the equal protection of the law it is only essential that there shall be some rational connection between the fact proved and the ultimate fact presumed,

> and that the inference of one fact from proof of another shall not be so unreasonable as to be a purely arbitrary mandate."

See also *McFarland* v. *American Sugar Refining Co.*, 241 U. S., 79.

It is therefore submitted that the statute as construed by the New Jersey Court is unconstitutional with respect to the plaintiff in error, on well settled principles many times laid down by this Court.

The fact that the tax is levied under the police power of the State of New Jersey does not, of course, permit it to deprive citizens of the equal protection of the laws.

> *Connolly* v. *Union Sewer Pipe Co., supra;*
> *Reid* v. *Colorado*, 187 U. S., 137, 151;
> *Atchison, Topeka & Santa Fe Ry.* v. *Vosburg*, 238 U. S., 56.

Argument is not necessary to demonstrate that water consumption, influenced as it is by weather, conflagrations, breaks in mains, and so forth, is essentially fluctuating, and that it cannot be said of it that the variance from day to day is so slight that a single day is as accurately reflective of consumption as an average over a longer period. Cf. *Gast Realty and Investment Co.* v. *Schneider Granite Co., ante*, page 7. The suppositions put forward, *ante*, pages 5 and 6, may be extreme cases but they are neither fantastic nor improbable; and they are eminently proper subjects for the consideration of

this Court; for, as was said in *Eubank* v. *Richmond*, 226 U. S., 137, 144, the enactment is to be tested

> "* * * by its extreme possibilities to show how in its tendency and instances"

inequality of protection inevitably results. See to the same effect, *Colon* v. *Lisk*, 153 N. Y., 188, 194, where the Court of Appeals said:

> "In discussing the constitutionality of this act, it is to be remembered that the question is to be determined not by what has been done under it in any particular instance, but by what may be done under and by virtue of its authority."

It is, therefore, respectfully submitted that the judgment should be reversed, and the cause remanded with directions that the complaint be dismissed.

Dated, February 5, 1923.

JEROME T. CONGLETON,
Corporation Counsel of the City of Newark,
Attorney for Plaintiff-in-Error.

GEORGE W. WICKERSHAM,
of Counsel.

Appendix.

N. J. LAWS OF 1907, CHAPTER 252.

An Act to establish a State Water-Supply Commission, and to define its powers and duties, and the conditions under which waters of this State may be diverted.

BE IT ENACTED *by the Senate and General Assembly of the State of New Jersey*:

1. The Governor, by and with the advice and consent of the Senate, shall appoint five citizens of this State to constitute a commission to be known as the State Water-Supply Commission. The commission shall make necessary rules and regulations for the performance of its duties. It shall be charged with a general supervision over all the sources of potable and public water-supply, to the end that the same may be economically and prudently developed for the use of the people of this State.

2. No municipal corporation, corporation or person engaged in supplying or proposing to supply the inhabitants of any municipal corporation with water, shall have power to condemn lands or water for any new or additional source of water-supply, or to divert water from such new or additional source until such municipal corporation, corporation or person has first submitted descriptions thereof, which may be accompanied by maps and plans, to said commission, and until said commission shall have approved the same; *provided*, nothing in this section shall be interpreted to restrict any municipality in acquiring, by purchase or condemnation, any existing or operating water works supplying said municipality with water; *and provided further*, that where any such municipal corporation, corporation or person has already acquired lands or water, and has in good

faith commenced the construction of works for such new or additional water-supply, this section shall not apply to construction or lands or water necessary to complete such works, or to put in use such water-supply, if maps, plans and descriptions of such lands, works and water-supplies shall be filed with the commission within ninety days of the approval of this act. Nothing in this act contained shall be construed to take from any municipality in this State the right to use and take all the water which it has the right to use or appropriate by purchase or condemnation.

3. Any municipal corporation, corporation or person may make application by petition, in writing, to the said commission for the approval of its plans for obtaining such new or additional source of water-supply, which application shall show the sources of the proposed supply, the approximate location of the proposed reservoirs or other works, with their estimated capacities, an abstract of any official reports relating to the same, and showing the need for an added supply, and the reasons for the choice made. The commission shall thereupon give notice, by advertisement in one or more newspapers published in the vicinity, of a public hearing, at which all persons or municipalities affected by the proposed plans may be heard for or against the granting of the application. After due hearing, the commission shall decide whether the plans proposed are justified by public necessity or reasonably anticipated public use, and whether such plans interfere unduly with the opportunity of other municipalities to obtain a water-supply by the taking of waters necessary for their use, or whether the reduction of the dry-season flow of any stream will be caused to an amount likely to produce unsanitary conditions or otherwise unduly injure public or private interests. Such commission shall, within ninety

days after receiving the application, and with all convenient speed, either approve such application, reject it entirely, or approve the same subject to such reasonable terms and conditions as the commission may prescribe. The decision of the commission upon any such application shall be in writing and signed by at least a majority of its members, and shall be filed, together with the application and all plans, maps, surveys and other papers or records relating thereto, in its office, and a copy of the decision certified under seal of the commission shall be forthwith served upon the applicant or his attorney or agent named in the application, which copy shall be evidence in all courts and places. The approval of the commission shall constitute the State's assent to the diversion of water and the construction and operation of the water-works in accordance with the terms of the decision and the plans filed therewith. The decisions of the commission shall at all times be subject to review by the courts for reasonableness, legality or form.

4. The commission shall have power to subpoena and require the attendance before it of witnesses, and the production of books and papers pertinent to the investigation and inquiries which it is by this act authorized to make, and to examine them or such public records as it shall require in relation thereto. In the event of any person or corporation refusing to obey said subpoena he or it may be punished as for contempt of the Supreme Court, on application by petition to a justice of said court.

5. The commission shall also have power to require annual reports from all municipal corporations, corporations or persons diverting water for water-supply purposes, as to the amount of water diverted by them, the communities and population supplied, the rates charged,

and such other matters as shall be requisite to a proper supervision of the water-supplies of the State and the development and public use thereof. It shall be the duty of the officers in control of municipal or other water-works to keep accurate records, by meters or other approved methods, of the amount of water used, and to report the same quarter yearly to said commission. The commission shall also have power to make such investigations of the meters and records of said corporations of the water diverted as may be necessary to determine all matters pertinent to their duties. It shall also have power to examine the plants and works of all public water-supplies in the State, to aid it in ascertaining the sources of the supply.

6. The commission shall have an official seal. The term of each member thereof shall be for five years, except that the members of the said commission first appointed shall hold office, respectively, one for one year, one for two years, one for three years, one for four years and one for five years. The members of the commission shall receive an annual salary of two thousand five hundred dollars each, to be paid monthly by the State Treasurer, and be paid their necessary and reasonable expenses actually incurred in the prosecution of their duties. The commission is hereby authorized and empowered to employ a secretary and such engineers, clerks and subordinates as the duties imposed upon it by this act may require, and to fix and pay the reasonable salaries and expenses of such subordinate officers for the purposes of this act. All expenses incurred by said commission shall be paid, by the State Treasurer, on warrant of the Comptroller, out of moneys to be annually appropriated for the purpose, upon vouchers duly approved by the president and attested by the secretary of the commission.

7. The commission shall annually, on or before the thirtieth day of November of each year, submit a written report in detail of its proceedings during the preceding year to the Governor.

8. Every municipality, corporation or private person now diverting the waters of streams or lakes with outlets for the purpose of a public water-supply shall make annual payments on the first day of May to the State Treasurer for all such water hereafter diverted in excess of the amount now being legally diverted; *provided, however,* no payment shall be required until such legal diversion shall exceed a total amount equal to one hundred (100) gallons daily, per capita for each inhabitant of the municipality or municipalities supplied, as shown by the census of one thousand nine hundred and five. And every municipality, corporation or private person not at present diverting surface waters for said purpose, but who shall hereafter divert such waters, shall make annual payments on the first day of May to the State Treasurer for all waters diverted in excess of a total of one hundred (100) gallons daily for each inhabitant of the municipality or municipalities supplied, as shown by the census of one thousand nine hundred and five. Such payment shall be deemed to be a license and its amount shall be fixed by said commission at a rate of not less than one dollar ($1.00) or more than ten dollars ($10.00) per million gallons. If at all times an amount equal to the average daily flow for the driest month, as shown by the existing records, or in lieu thereof one hundred and twenty-five thousand gallons daily for each square mile of unappropriated watershed above the point of diversion, shall be allowed to flow down the stream, the commission shall fix the minimum rate and may increase the rate proportionally as a less amount is

allowed to flow down the stream below the point of diversion, due account being taken in fixing said increase both of the duration and amount of said deficiency; *provided, however,* the aforesaid one hundred and twenty-five thousand gallons daily for each square mile of unappropriated watershed shall be additional to the dry-season flow or any part thereof which may be allowed to flow down from any appropriated watershed or watersheds above said point of diversion. Water diverted within the corporate limits of a municipality for manufacturing and fire purposes only, and returned without pollution to the stream from which it was taken within said corporate limits shall not be reckoned in making up the aggregate amount diverted. Said commission shall certify to the State Comptroller, as soon as practicable after the first day of January, and not later than the fifteenth day of February of each year, the names of all municipalities, corporations or private persons owing money to the State for the diversion of water during the preceding year, with the amount so due. The State Comptroller shall promptly notify said municipalities, water companies or private persons of their indebtedness to the State, and in case said amounts are not paid the State Treasurer on or before the first day of July of the same year, the State Comptroller shall certify to the Attorney-General for collection the names of such delinquent municipalities, water companies or private persons and the amounts due from each, and it shall be the duty of the Attorney-General to take immediate steps to collect the same in the name of the State. Any party aggrieved by the action of the commission, upon filing written complaint on or before March twentieth, shall be heard and permitted to give evidence of the facts, and the sum fixed may be changed, reduced or cancelled, as the facts may warrant. All sums received as above provided shall

be credited by the State Treasurer to a special fund, to be used by said commission as the Legislature may direct for the control of the waters and conservation of the water-supplies of the State. The provisions herein contained as to payment to the State for water diverted from surface sources shall not apply to water obtained from wells. Nothing in this act shall be construed to confer upon any municipality, corporation or person any franchise not already possessed by said municipality, corporation or person, but the approval of the said commission contained in its decision as above provided shall constitute the assent of the State to the diversion of water as against the State in accordance with the terms of said decision.

9. The said commission, with the assistance of expert engineers, shall examine the plans for storage or other reservoirs heretofore or hereafter made by any bureau, department or commission of the State, and shall advise the Legislature, as soon as practicable, as to the need of such reservoir or reservoirs; which plans best meet these needs; the benefits, cost of construction and maintenance thereof; the revenue to be derived therefrom and methods by which such plans may be carried out. It shall be the duty of every such bureau, department or commission to furnish said Water-Supply Commission all information in its possession regarding their respective plans, in order that said Water-Supply Commission may be able to take full advantage of all surveys, estimates and investigations heretofore made. The sum of ten thousand dollars is hereby appropriated to pay the expenses of the investigations in this section referred to. Nothing in this act shall be construed to authorize the commission to grant to any private corporation or persons the right to construct either of the

reservoirs heretofore proposed for flood control in the Passaic river.

10. All acts and parts of acts inconsistent with this act be and the same are hereby repealed, and this act shall take effect immediately.

Approved June 17, 1907.

Supreme Court of the United States

October Term, 1922

No. 469

THE CITY OF NEWARK,
Plaintiff in Error,

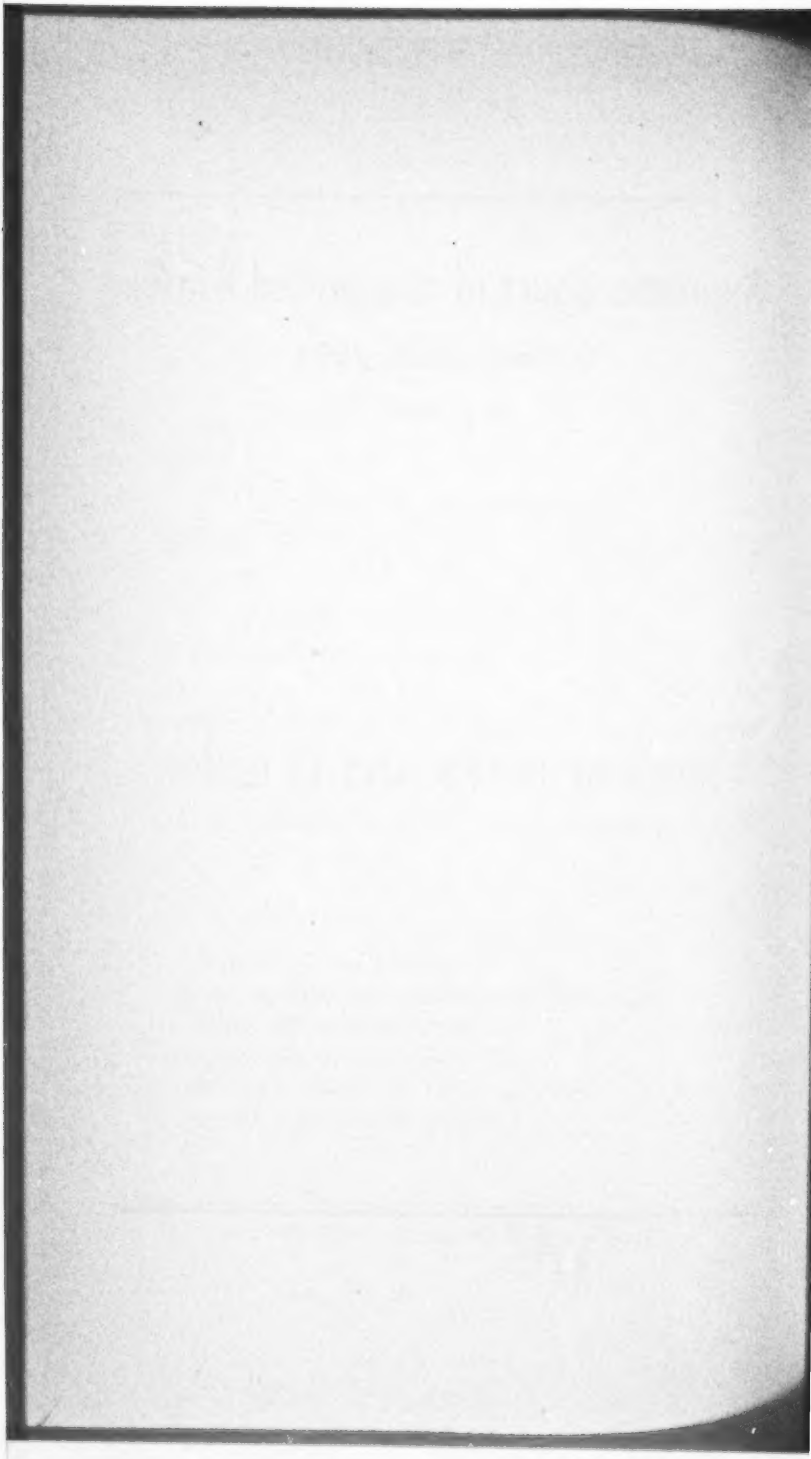
vs.

THE STATE OF NEW JERSEY,
Defendant in Error.

BRIEF OF DEFENDANT IN ERROR

THOMAS F. McCRAN,
Attorney-General of the State of New Jersey,
WILLIAM NEWCORN,
Assistant Attorney-General,
Attorneys and of Counsel, State of New Jersey, Defendant in Error.

MacCrellish & Quigley Co., State Printers.



INDEX.

CASES CITED.

Supreme Court of the United States

October Term, 1922

No. 469

THE CITY OF NEWARK, *Plaintiff in Error,*

vs.

THE STATE OF NEW JERSEY, *Defendant in Error.*

In Error, &c.

BRIEF OF THE DEFENDANT IN ERROR.

STATEMENT.

In 1907 the Legislature passed Chapter 252 of the Laws of 1907, entitled "An act to establish a State Water-Supply Commission, and to define its powers and duties, and the conditions under which waters of this State may be diverted." This act supersedes Chapter 250 of the Laws of 1888, entitled "An act to authorize any of the municipal corporations of this State to contract for a supply, or a further or other supply of water therefor." Under the provisions of this act a commission was appointed by the Governor, charged with the supervision over all the sources of potable and public water-supply, the first section containing the following significant language, to wit: "to the end that the same may be economically and prudently developed for the use of the people of this State." The second section of the act prohibits any municipal corporation, corporation or person engaged in supplying the inhabitants of any municipal corporation with water, from exercising the power to condemn lands or water for any new or additional source of water-supply or to divert water from such new or addi-

tional source until such municipal corporation, corporation or person has first submitted descriptions thereof, which may be accompanied by maps and plans, to said commission, and until said commission shall have approved the same.

The action in question was instituted under the provisions of section 8 of the act, which provide that—

> "Every municipality, corporation or private person now diverting the waters of streams or lakes with outlets for the purpose of a public water-supply shall make annual payments on the first day of May to the State Treasurer for all such water *hereafter diverted in excess of the amount now being legally diverted;* provided, however, no payment shall be required until such legal diversion shall exceed a total amount equal to one hundred gallons daily, per capita, for each inhabitant of the municipality or municipalities supplied, as shown by the census of one thousand nine hundred and five. And every municipality, corporation or private person not at present diverting surface waters for said purpose, but who shall hereafter divert such waters, shall make annual payments on the first day of May to the State Treasurer for all waters diverted in excess of a total of one hundred gallons daily for each inhabitant of the municipality or municipalities supplied, as shown by the census of one thousand nine hundred and five. Such payment shall be deemed to be a license and its amount shall be fixed by said commission at a rate of not less than one dollar or more than ten dollars per million gallons," &c.

The section further provides certain regulations in regard to the charges, amongst which is the certification by the commission to the State Comptroller, as soon as practicable after the first day of January, and not later than the fifteenth day of February of each year, the names of all municipalities, corporations or private persons owing money to the State for the diversion of water during the preceding

year, with the amount so due. The notification to the municipalities, water companies or private persons of their indebtedness to the State, and in case of nonpayment to the State Treasurer on or before the first day of July of the same year, the certification by the State Comptroller to the Attorney-General for collection the names of such delinquents and the amounts due from each, and authorizes the Attorney-General to take immediate steps to collect the same in the name of the State.

The section further confers authority upon any party aggrieved by the action of the commission, upon filing written complaint on or before March 20th of that year, an opportunity to be heard, and to give evidence of the facts, and confers authority upon the commission to change, reduce or cancel the sums fixed, as the facts may warrant.

The section further provides—

> "All sums received as above provided shall be credited by the State Treasurer to a special fund, to be used by said commission as the Legislature may direct for the control of the waters and conservation of the water-supplies of the State."

The proceedings outlined in the statute were strictly followed in connection with the City of Newark. Suit was instituted by the Attorney-General in behalf of the State to recover the arrearage due to the State for excess water diversion from the municipality, under the provisions of the act. The defenses of the city were stricken out in the Supreme Court and judgment entered, which judgment was subsequently affirmed by the Court of Errors and Appeals (Record, p. 44).

The plaintiff in error has abandoned all its assignments of error in its brief, and relies upon one assignment only, to wit, "that the act of 1907 as construed violates the city's rights under the Fourteenth Amendment and denies it the equal protection of the laws," and hence the argument of this brief will be simply confined to two questions—first, that the act is a conservation measure under the police power of the State to regulate and control the waters of the State for

the purpose of conservation; and, second, that the act in question does not violate the city's rights under the Fourteenth Amendment and deny it the equal protection of the laws.

ARGUMENT.

The Act of 1907 is a Conservation Measure to Preserve the Waters of the State for the Use of the People of the State.

In considering this entire subject, it must be borne in mind that this legislation, as expressed in the title and in the first section thereof, was for the purpose of establishing a State Water-Supply Commission (now Department of Conservation and Development), of defining its powers and duties and the conditions under which waters of this State may be diverted. The act was passed for the protection of the public. The charge for excess diversion upon which the suit was founded is expressly stated by the statute to be a license, not a denial to use water, this right being preserved in the second section of the act. The payment of excess charges legalizes the excess diversion. The delegation or grant of power to the State Water-Supply Commission, now continued in the Board of Conservation and Development, is a grant of a part of the State's sovereignty, to be exercised by the designated agents in the interest and for the welfare of the whole sovereignty and all its people.

> "The policy of the common law is to assign to everything capable of ownership a certain and determinate owner. If capable of occupancy and susceptible of private ownership and enjoyment, the common law makes it exclusively the subject of private ownership; but if such private ownership and enjoyment are inconsistent with the nature nature of the property, the title is in the sovereign, as trustee for the public, holding it for common use and benefit."

Cobb v. *Davenport*, 32 *N. J. L.*, at page 378.

The importance of the subject-matter is well expressed by Justice Pitney, speaking for the Court of Errors and Appeals in *McCarter, Attorney-General,* v. *Hudson County Water Company*, 70 *N. J. Eq.* 695, in construing the act of 1905, which forbade diversion from the State of the waters of lakes and streams, when he said:

> "It must, we think, be sufficiently obvious that the government established in this State by and for the people thereof has complete dominion (subject only to constitutional limitations), over all things within the borders of the State, including all lands and waters, and the mode of acquiring and disposing of rights of property thereon. The fresh water lakes, ponds, brooks and rivers, and the waters flowing therein, constitute an important part of the natural advantages of this territory, upon the faith of which its population has multiplied in numbers and increased in material and moral welfare. The regulation of the use and disposal of such waters, therefore, if it be within the powers of the State, is among the most important objects of government."

Mr. Justice Holmes, in the same case, speaking for the Supreme Court of the United States, 209 *U. S.* 349, said:

> "It appears to us that few public interests are more obvious, indisputable and independent of particular theory than the interests of the public of a State to maintain the rivers that are wholly within it substantially undiminished, except by such drafts upon them as the guardian of the public welfare may permit for the purposes of turning them to a more perfect use. This public interest is omnipresent wherever there is a State and grows more pressing as population grows."

In the case of *Collingswood* v. *Water Supply Commission*, 84 *N. J. L.* 110, the legislative intent was recognized by the New Jersey Supreme Court in construing the legis-

lation pertaining to the subject-matter, wherein it said, after discussing the various acts of the Legislature:

> "It is quite evident, therefore, that the policy of the State is one of determination to conserve, and as we view the matter, to economize to the fullest extent that is reasonable, the water resources of the State for the benefit of all its inhabitants. The growing scarcity of water supply is a matter of common knowledge, and a great deal of the fiercest litigation in the courts at the present time arises out of disputes over the ownership of water rights. Consequently, in looking at the acts of 1907 and 1910, this policy should be kept in mind; though indeed this is hardly necessary in view of the language of those very acts, for the act of 1907 in its very first section says that the State Water Supply Commission 'shall be charged with a general supervision over all the sources of potable and public water supply, to the end that the same may be economically and prudently developed for the use of the people of this State.'"

Similar views are to be found in *Paterson* v. *East Jersey Water Company*, 74 *N. J. Eq., p.* 49, affirmed 77 *N. J. Eq., p.* 588, and *Wilson, Attorney-General,* v. *East Jersey Water Company*, 78 *N. J. Eq., p.* 329.

Point II.

The Act of 1907 Violates None of the City's Rights Under the Fourteenth Amendment, and Does Not Deny it the Equal Protection of the Laws.

The plaintiff in error is a municipal corporation, deriving its power, in fact, its very existence, from such delegation of power as might be conferred upon it by acts of the Legislature. In other words, it is a State agency, to exercise under its delegated power, within the boundary of its char-

ter limits, those powers delegated to it by the Legislature of the State. The State delegated the authority to the municipality to enter into contracts with private corporations for the purpose of supplying its inhabitants with water, or to own its own water works, and under this authority, at the time of the passage of the act, the plaintiff in error was supplying its inhabitants with water to the year 1900, by private contracts with the East Jersey Water Company, and subsequently by right derived from the East Jersey Water Company and other water companies. At the time of the passage of Chapter 252 of the Laws of 1907 the act in question conserved to all the municipalities, persons and private corporations the right to take as much water as was necessary to supply its inhabitants, to the extent that it was then legally diverting, or to the extent of one hundred gallons per capita, based upon the census of 1905.

The plaintiff in error contends in his brief that he has been denied the equal protection of the laws by reason of the arbitrary fixing of a license fee upon all water diverted in excess of the limitation fixed by the statute. in view of the fact that the act applied to every municipality, person or corporation then legally diverting water, there was no discrimination and no denial of the equal protection of the laws.

The term "now being legally diverted," as used in the act, where the question was raised that at the time when this act went into effect the companies were under contract to supply certain municipalities with whatever quantities of water they from time to time required, and that the excess water diverted by them was not subject to license fee so long as the diverted water is required to fulfill the contracts, was defined in the cases of the *East Jersey Water Company* v. *Board of Conservation and Development,* and *Acquackanonk Water Company* v. *Board of Conservation and Development,* 91 *N. J. L., p.* 488, where the court said:

> "This construction will make the statute inefficacious because the growing demands of the different contracting municipalities for water may take the

> entire flow of the Passaic River, and ought not to be adopted unless required by the statute in plain terms. The statute requires payment 'for all such water hereafter diverted in excess of the amount now being legally diverted,' with the proviso that no payment be required until the legal diversion shall exceed one hundred gallons per day per capita. We are of opinion that 'legally diverted' means not a future diversion, but one now being exercised under a legal right, and that under this statute a legal abstractor may take what he was diverting in 1907, and, if that did not reach the statutory maximum of exemption, as much more as is required to make the total diversion one hundred gallons per day per capita for each of the municipalities supplied, without payment of the license fee."

The term "equal protection of the laws" means subjection to equal laws applying alike to all in the same position.

The law in question applies to all of the municipalities, corporations and persons engaged in the supplying of water to the inhabitants of their respective municipalities, and there is nothing in the entire act which would indicate an attempt upon the part of the sovereign power to discriminate against the plaintiff in error.

The question whether a State law deprives a party of rights secured by the Federal Constitution depends not upon how it is characterized, but upon its practical operation and effect. *Henderson* v. *Mayor of New York*, 92 *U. S.* 259; *Stockard* v. *Morgan*, 185 *U. S.* 27; *Galveston, Harrisburg and San Antonio R. Co.* v. *Texas*, 210 *U. S.* 217; *Western Union Telegraph Co.* v. *Kansas*, 216 *U. S.* 146; *St. Louis Western R. R. Co.* v. *Arkansas*, 235 *U. S.* 350.

The Federal Constitution does not require a separate exercise by the States of their powers of regulation and of taxation. *Gundling* v. *Chicago*, 117 *U. S.* 183.

As was well said in the case of *Williams* v. *Eggleston*, 170 *U. S.*, on page 310:

> "But this overlooks the fact that the regulation of municipal corporations is a matter peculiarly within the domain of State control; that the State is not compelled by the Federal Constitution to grant to all its municipal corporations the same territorial extent, or the same duties and powers. A municipal corporation is, so far as its purely municipal relations are concerned, simply an agency of the State for conducting the affairs of government, and as such it is subject to the control of the Legislature. That body may place one part of the State under one municipal organization and another part of the State under another organization of an entirely different character. These are matters of a purely local nature, in respect to which the Federal Constitution does not limit the power of the State."

The power of the Legislature over corporations created for purposes of local government is supreme. From a grant of this character, no contract arises with the corporators which exempts it from legislative control. The Legislature may alter, modify or repeal the charter at any time in its discretion. The only limitation on the operation of such repeal is as to creditors, that it shall not operate to impair the obligation of existing contracts, or deprive them of any remedy for enforcing such contracts which existed when they were made.

In the case of *Laramie County* v. *Albany County*, 92 *U. S.* 307, Mr. Justice Clifford, writing the opinion for the court, said:

> "Institutions of this kind, whether called counties or townships, are the agencies of the State in the important business of municipal rule and cannot have the least pretensions to sustain their privileges or their existences from either right, a contract between them and the Legislature of the State, because there is not, and cannot be, any reciprocity or stipulation, and their objects and

> duties are utterly incompatible with everything of the nature of contract."

The contention of the municipality that the application of the license fee under the provisions of the act was arbitrary and unreasonable is without merit. As was said by Mr. Justice Holmes, in the case of *Hudson County Water Company, Plaintiff in Error,* v. *Robert H. McCarter, Attorney-General of the State of New Jersey,* 209 *U. S.* 349:

> "We are of the opinion further that the constitutional power of the State to insist that its natural advantages shall remain unimpaired by its citizens is not dependent upon any nice estimate of the extent of present use or speculations as to future needs. The legal conception of the necessary is apt to be confined to somewhat rudimentary wants, and there are benefits from a great river that might escape a lawyer's view. But the State is not required to submit even to an æsthetic analysis. Any analysis may be inadequate. It finds itself in possession of what all admit to be a great public good, and what it has it may keep and give no one a reason for its will."

The power of the States in the control of their own governmental agencies is not limited or affected by the equality clause of the Fourteenth Amendment, and such amendment has no application to legislation by the State withdrawing or modifying the powers previously vested in its political subdivisions. *People* v. *Metz,* 193 *N. Y.* 148; *Williams, Treasurer,* v. *Eggleston,* 170 *U. S.* 304.

The word "person" as used in the equality clause of the Federal Constitution was never intended to apply to a municipal corporation, a creature of the State, although it contemplates private corporations. The amendment was intended to secure equality of right, and renders unconstitutional all laws which may properly be construed as applying to persons or property arbitrarily and with discrimination, unequally or unjustly, and without regard to the exercise of executive discretion. But State legislation does not

constitute a denial of the equal protection of the laws so long as all persons subject to it are treated alike, under similar circumstances and conditions in respect both to the privileges conferred and to the liabilities imposed, there being no distinction between the effect of privileges conferred and that of burdens imposed.

Plaintiff in Error being a mere agent of the State stands in its governmental or public character in no contract relation with its sovereign, at whose pleasure its charter may be amended, changed or revoked without the impairment of any constitutional obligation.

Point III.

The Writ of Error Should Be Dismissed.

To summarize, the act in question is constitutional because it is a valid exercise of the police power of the State for the purpose of conserving the waters of the State for the benefit of the public. It does not deny to the Plaintiff in Error the equal protection of the laws, and the provisions thereof under which the license fee has been charged against the municipality are neither arbitrary nor unreasonable. And for these reasons the writ should be dismissed.

Respectfully submitted,

THOMAS F. McCRAN,
Attorney-General of the State of New Jersey,
WILLIAM NEWCORN,
Assistant Attorney-General,
Attorneys and of Counsel, State of New Jersey, Defendant in Error.

IN THE

Supreme Court of the United States

October Term, 1922, No. 469

THE CITY OF NEWARK,
Plaintiff-in-Error,

vs.

THE STATE OF NEW JERSEY,
Defendant-in-Error.

Reply Brief on Behalf of Plaintiff-in-Error

JEROME T. CONGLETON,
Corporation Counsel of
The City of Newark,
Plaintiff-in-Error.

GEORGE W. WICKERSHAM,
of Counsel.

INGLE, INC., 165 William Street, New York City

INDEX

Table of Cases Cited.

IN THE

Supreme Court of the United States

October Term—1922.

THE CITY OF NEWARK, *Plaintiff-in-Error,* *against* THE STATE OF NEW JERSEY, *Defendant-in-Error.*	**No. 469**

REPLY BRIEF ON BEHALF OF PLAINTIFF-IN-ERROR.

The brief for the State recognizes no distinction between political and governmental matters in which municipalities are the representatives of the sovereignty of the State, and auxiliary to it, and other matters relating to property rights in which they have the attributes and distinctive legal rights of private corporations.

It cannot be disputed that the City of Newark, in acquiring and operating this plant for the production and distribution of its water supply, was acting in a private and proprietary capacity.

As said in *City of Winona* v. *Botzet*, 169 Fed., 321, 333 (C. C. A., Eighth Circuit, 1909), per SANBORN, *C. J.*,

> "The power of a city to construct and operate waterworks is not a political or governmental, but a private or corporate, power, granted and exercised, not to enable it to control its people, but to authorize it to furnish to itself and to its inhabitants water for their private advantage."

See also:

Illinois Trust and Savings Bank v. *City of Arkansas City*, 22 C. C. A., 171, 182; 76 Fed., 271, 282; 34 L. R. A., 518;
Pikes Peak Powder Co. v. *City of Colorado Springs*, 44 C. C. A., 333; 105 Fed., 1, 10;
Omaha Water Co. v. *City of Omaha*, 77 C. C. A., 267, 271; 147 Fed., 1; 12 L. R. A. (N. S.), 736;
Atkyn v. *Town of Randolf*, 31 Vt., 226;
Grogan v. *San Francisco*, 18 Cal., 590;
Benson v. *New York*, 10 Barb., 223, 245.

The argument on behalf of the State is predicated upon two contentions:

First: That the Act of 1907 is a conservation measure to preserve the waters of the State for the use of the people of the State.

Second: That the Act of 1907 violates none of the City's rights under the Fourteenth Amendment, and does not deny it the equal protection of the laws.

The first contention is answered by the construction put upon the act by the Court of Errors and Appeals. That tribunal declares that the act "expressly assumes" the right of these defendants to extract water from their respective sources of supply and imposes no tax thereon. It also assumes their right to continue to extract water from such sources as the demands of their populations and local exigencies may require." Where then is the conservation of natural resources? The fact is that the law, so far as the present controversy is concerned, is a tax act pure and simple, and one that falls most unequally upon persons and corporations similarly situated. True, the Court upheld the act as a valid exercise of the police power of the State, but it did so by assuming that the statute was a measure to regulate the use

and disposal of the waters of the State, whereas it had itself first put the water rights of defendant upon an indisputable basis and then ignored the fact that no attempt was made in the act to regulate those rights, but only to tax their exercise. Even a tax levied by virtue of the police power of the State of New Jersey may not deprive citizens of the equal protection of the laws.

Connolly v. *Union Sewer Pipe Co.*, 184 U. S., 540;
Reid v. *Colorado*, 187 U. S., 137;
Atchison, Topeka & Santa Fe Ry. v. *Vosburg*, 238 U. S., 56.

It is, however, contended by the State that there can be no denial of the City's rights under the Fourteenth Amendment or denial of the equal protection of the laws for reasons which may be summarized in the statement that:

> "The power of the States in the control of their own governmental agencies is not limited or affected by the equality clause of the Fourteenth Amendment, and such amendment has no application to legislation by the State withdrawing or modifying the powers previously vested in its political subdivisions."

No effort is made in the brief for the State to contravert the very obvious facts of our contention with reference to the arbitrary and capricious method of assessment arising out of a construction of the words "now being legally diverted," as used in the Act of 1907.

The argument is predicated upon the assumption that, as a mere political subdivision of the State, a City may not, under any circumstances, invoke the protection of those Constitutional provisions which protect the vested rights of private corporations or citizens.

It is submitted that in those cases where the municipality is exercising its function in a private or proprietary capacity, however, the principle has no application. This very fundamental distinction which controls and modifies the rights, duties and obligations of municipal corporations in their relations to the sovereign power of the State was judicially recognized in the celebrated judgment rendered by Mr. Justice STORY in the Dartmouth College Case (*Dartmouth College* v. *Woodward*, 4 Wheat., 694-698) when he said:

> "It may also be admitted that corporations for mere public government such as towns, cities and counties, may in many respects be subject to legislative control, but it will hardly be contended that, even in respect to such corporations, the legislative power is so transcendant that it may, at its will, take away the private property of the corporation, or change the uses of its private funds acquired under the public faith. * * * From the very nature of our governments, the public faith is pledged the other way; and that pledge constitutes a valid compact; and that compact is subject only to judicial inquiry, construction and abrogation. This court has already had occasion, in other causes, to express their opinion on this subject; and there is not the slightest inclination to retract it."

In *People ex rel Rodgers* v. *Color*, 166 N. Y., 1, 11; 52 L. R. A., 814, Mr. Justice O'BRIEN, speaking for the Court of Appeals, declared:

> "The city is a corporation possessing all the powers of corporations generally, and cannot be deprived of its property without its consent or due process of law any more than a private corporation can; * * *."

In *People* v. *Ingersoll*, 58 N. Y., 1, the Court said:

> "In political and governmental matters the municipalities are the representatives of the sover-

eignty of the State, and auxiliary to it; in other matters, relating to property rights and pecuniary obligations, they have the attributes and the distinctive legal rights of private corporations, and may acquire property, create debts, and sue and be sued as other corporations; and in the borrowing of money and incurring pecuniary obligations in any form, as well as in the buying and selling of property within the limits of the corporate powers conferred, they neither represent nor bind the State.

"The relation of principal and agent does not and cannot exist, for obvious reasons, between the State and the various municipal corporations created with power to contract debts, in respect to the exercise of the corporate functions. Debts contracted by the municipalities, by authority of the Legislature, are contracted by them as principals and not as agents of the State."

What is said by the Court in this case applies with peculiar propriety and force to the case at bar.

In *People* v. *Hurlburt*, 24 Mich., 44, Mr. Justice Cooley, in the course of the great judgment delivered by him in that case, said:

"Conceding to the State the authority to shape the municipal organizations at its will, it would follow that a similar power of control might be exercised by the State as regards the property which the corporation has acquired, or the rights in the nature of property which have been conferred upon it. There are cases which assert such power, but they are opposed to what seem to me the best authorities as well as the soundest reason. The municipality, as an agent of government, is one thing; the corporation, as an owner of property, is in some particulars to be regarded in a very different light. The Supreme Court of the United States held at an early day the grants of property to public corporations could not be resumed by the sovereignty. *Terrett* v. *Taylor*, 9 Cranch, 43; *Town of Pawlet* v. *Clark*, *Ibid.* 292;

and see *Dartmouth College* v. *Woodward*, 4 Wheat, 694-698. When the State deals with a municipal corporation on the footing of contract, it is said by TRUMBULL, *J.*, in *Richland* v. *Lawrence*, 12 Ill. 8, the municipality is to be regarded as a private company. In *Detroit* v. *Corey*, 9 Mich., 165, MANNING, *J.*, bases his opinion that the city was liable for an injury to an individual, occasioned by falling into an excavation for a sewer, carelessly left open, upon the fact that the sewers were the private property of the city, in which the outside public or people of the State at large had no concern. In *Warren* v. *Lyons*, 22 Ic., 351, it was held incompetent for the Legislature to devote to other public uses land which had been dedicated for a public square. In *State* v. *Haben*, 22 Wis., 660, an act appropriating moneys collected for a primary school to the erection of a State Normal School building in the same city was held void. Other cases might be cited, but it seems not to be needful. They rest upon the well understood fact that these corporations are of twofold character; the one public as regards the State at large, in so far as they are its agents in government; the other private, in so far as they are to provide the local necessities and conveniences for their own citizens; *and that as to the acquisitions they make in the latter capacity as mere corporations, it is neither just, nor is it competent, for the Legislature to take them away, or to deprive the local community of the benefit thereof.* There may come a time when from necessity the State must interpose. The State may change municipal boundaries; and then a division of the corporate property may be needful. The State may take away the corporate powers, and then the property must come to the State as trustee for the parties concerned. In either of these cases, undoubtedly, State action becomes essential; and the property may be disposed of according to the Legislative judgment and sense of justice; but even then the appropriation must have regard, so far as the circumstances of the case will admit, to the pur-

poses for which the property was acquired, and the interest of those who were corporators when the necessity for State intervention arose." (Italics ours.)

Obviously, we are not concerned here with the two exceptions noted, *supra*, by Mr. Justice COOLEY. There is no suggestion on the part of the State of New Jersey to have recourse to those ultimate prerogatives of sovereign power where necessity warrants a complete abrogation of the corporate charter or a change of municipal boundaries. Even in these extreme instances, however, it will be noted that the appropriation of property is surrounded by safeguards in an effort to minimize the effect of State intervention in this drastic way.

In *Commissioners, etc.*, v. *Lucas, Treasurer*, 93 U. S., 108, 115, the Court, in holding that the Legislature of a State might direct a restitution of property, exacted by taxation, in whatever form the property might be changed so long as it remained in the possession of the municipality, took occasion to define the general powers of a State over the political subdivisions thereof with regard to all property held for a specific public purpose, and then observed, per Mr. Justice FIELD:

> "But property, derived by them from other sources, is often held, by the terms of its grant, for special uses, from which it cannot be diverted by the legislature. In such cases, the property is protected by all the guards against legislative interference possessed by individuals and private corporations for their property. *And there would seem to be reasons equally cogent, in abstract justice, against a diversion by the legislature from the purposes of a municipality of property raised for its use by taxation from its inhabitants.*" (Italics ours.)

And again, in *Worcester* v. *Street Railway Co.*, 196 U. S., 539, 551, it was said by Mr. Justice PECKHAM:

> "Enough cases have been cited to show the nature of a municipal corporation as stated by this Court. In general, it may be conceded that it can own private property, not of a public or governmental nature, and that such property may be entitled, as is said, to 'constitutional protection.'"

In *Webb* v. *Mayor, etc., of New York*, 64 How. Pr. Rep., 10, it was held that the Legislature had no authority to pass an act ordering the demolition of a reservoir in actual use as part of the water system of New York, built by the City at the expense of its citizens, upon property which it thus owned in fee simple, and upon the demolition of such reservoir further enacting that the lands covered by it, together with other lands adjoining the same owned in like manner by the City, should be converted into, and maintained as, one of the public parks of the City, except upon making compensation to the City therefor.

In the course of a well-reasoned opinion, MACOMBER, *J.*, said:

> "I perceive no difference between the tenure of property thus held by the City and the proprietary rights of natural persons or private corporations. * * * It seems to me that the weight of authority is to the effect that the property which New York holds in its private or proprietary character, though originally derived from the power claiming the ultimate title, and which concerns the private advantage of the corporation, as a distinct legal personality, is stamped with so many of the rights and powers of natural persons or private corporations as that the city cannot be deprived of this reservoir without just compensation."

We have said that the highest court of the State of New Jersey has in this case construed the words "now being legally diverted" to mean the amount which was *actually* diverted on the day when the Act went into effect, viz: June 17, 1907. On that day, had the City of Newark flowed into its mains the entire 50,000,000 gallons which its plant, acquired by State authority, was capable of producing and which might therefore have been "legally diverted," the tax assessed would have been levied, according to the construction of the New Jersey Court, only upon the excess of the City's daily diversion thereafter over such 50,000,000 gallons, and as the complaint shows, there would have been no tax. As it was, it happened that on that day the City did not fully open the gates for its supply and diverted during that particular twenty-four hours only 36,241,666 gallons. According to the construction adopted, this purely accidental figure will for all time be the basis of the assessment of the tax upon the City of Newark.

In attempting to use, as a basis for all future taxation, this wholly arbitrary and capricious method, the State of New Jersey would attempt to deny to the various municipalities within her borders the equal protection of the laws in relation to a field of municipal activity clearly private and proprietary in its nature and universally conceded to fall within the protection of those constitutional provisions which operate to preserve the vested rights of private corporations and individuals in their relation to the sovereign power of State and Federal Governments.

We may readily concede to the Legislature a broad, sweeping control over the charters of municipal corporations, but, nevertheless, such control does not go to the extent of depriving them of their property acquired in their proprietary capacity, particularly, where, as in the instant case, there is no attempt to deprive the cities of their governmental functions.

It is, therefore, respectfully submitted that the judgment should be reversed, and the cause remanded with directions that the complaint be dismissed.

Dated, February 21, 1923.

JEROME T. CONGLETON,
Corporation Counsel of The City of Newark,
Attorney for Plaintiff-in-Error.

GEORGE W. WICKERSHAM,
of Counsel.

CITY OF NEWARK *v.* STATE OF NEW JERSEY.

ERROR TO THE SUPREME COURT OF THE STATE OF NEW JERSEY.

No. 469. Argued March 2, 1923.—Decided May 7, 1923.

1. The Equal Protection Clause of the Fourteenth Amendment cannot be invoked by a city against its State. P. 196. *Trenton* v. *New Jersey*, *ante*, 182.
2. So *held*, where it was claimed that the method adopted in c. 252, Laws of New Jersey, 1907, for fixing maximum amounts of water divertible without payment of license fees to the State, worked

---

[*] Cf. 1 Dillon Municipal Corporations, 5th ed., § 110, p. 183.

[†] See decisions per curiam: *Chicago* v. *Dempcy*, 250 U. S. 651; *Michigan ex rel. Groesbeck* v. *Detroit United Ry.*, 257 U. S. 609; *Chicago* v. *Chicago Railways Co.*, *id.* 617; *Avon* v. *Detroit United Ry.*, *id.* 618; *Edgewood* v. *Wilkinsburg & East Pittsburgh Street Ry. Co.*, 258 U. S. 604; *Sapulpa* v. *Oklahoma Natural Gas Co.*, *id.* 608.

arbitrary discriminations, prejudicial to the City of Newark. P. 195.

Writ of error to review 117 Atl. 158, dismissed.

ERROR to a judgment of the Supreme Court of New Jersey, affirmed by the Court of Errors and Appeals, in favor of the State, in its action to recover license fees from the City of Newark, for water diverted from the Pequannock River.

Mr. George W. Wickersham, with whom *Mr. Jerome T. Congleton* was on the briefs, for plaintiff in error.

Mr. William Newcorn, Assistant Attorney General, with whom *Mr. Thomas F. McCran*, Attorney General, of the State of New Jersey, was on the brief, for defendant in error.

MR. JUSTICE BUTLER delivered the opinion of the Court.

The State of New Jersey recovered judgment against the City of Newark for $18,104.08 and costs, in an action brought in the State Supreme Court. The judgment was affirmed by the Court of Errors and Appeals, and the case is here on writ of error. It is based on a state enactment which is attacked on the sole ground that it violates the equal protection clause of the Fourteenth Amendment.

The State's right to recover depends upon the validity of an enactment of the State (c. 252, Laws of 1907) which is sufficiently set forth in the decision of this Court in *Trenton* v. *New Jersey*, handed down on this day, *ante*, 182.

In *East Jersey Water Co.* v. *Board of Conservation & Development*, 91 N. J. L. 448, 453, it is said:

"The statute requires payment 'for all such water hereafter diverted in excess of the amount now being legally diverted,' with the proviso that no payment be required until the legal diversion shall exceed one hun-

dred gallons per day per capita. We are of opinion that 'legally diverted' means not a future diversion, but one now being exercised under a legal right, and that under this statute a legal abstractor may take what he was diverting in 1907, and, if that did not reach the statutory maximum of exemption, as much more as is required to make the total diversion one hundred gallons per day per capita for each of the municipalities supplied, without payment of the license fee.

"If, in 1907, the daily diversion exceeded one hundred gallons per capita, the amount then diverted, if lawful, may be taken without payment, and if it was less, no license fee can be imposed until it exceeds the statutory quantity."

The complaint alleged that under the provisions of this act the City was "permitted to divert . . . an average daily free allowance of water to the amount of 36,241,666 gallons, the said last mentioned amount being the amount of water which was being diverted by said municipality on June 17th, aforesaid, the date when the act aforesaid became effective and operative"; and claimed for each of the years subsequent to July 1, 1914, a license fee of one dollar per million gallons for the excess of the daily average diversion of water over the quantity above specified. The answer alleged that prior to the passage of the Act of 1907, the City had acquired a plant capable of furnishing 50,000,000 gallons of water per day, and set up certain separate defenses. At the trial, the court on motion of the State, struck out the separate defenses; the facts were not in controversy, and judgment was given for the amount claimed. About the same time, the State also recovered judgment against the City of Trenton for the license fee imposed by the same act. Both cases were taken to the Court of Errors and Appeals, the highest court of the State, and there by one decision the judgments were affirmed. (117 Atl. 158.) That court said:

"The facts are not in dispute. It is conceded that the city of Trenton, at the time of the enactment of the act of 1907, was taking from the Delaware river daily 14,200,000 gallons of water for local use, and that the city of Newark was daily extracting from the Pequannock river 36,241,666 gallons for local use. These diversions represent the antestatutory flowage, and are considered by the state under the eighth section of the act of 1907 to be nontaxable."

To establish its contention that § 8 of the enactment in question so discriminates between those authorized to divert water that it violates the equal protection clause of the Fourteenth Amendment, the City says that the highest court has in this case construed the words "now being legally diverted" to mean the amount of water which was actually diverted on the day when the act went into effect, namely, June 17, 1907; that had the City flowed into its mains 50,000,000 gallons that day, the tax would have been levied only upon the excess over that amount, and on the facts shown in the complaint, there would have been no tax in the years above referred to; that the purely accidental figure of 36,241,666 gallons, the amount actually diverted on that day, will for all time be the basis of the assessment of the tax upon the City. It is suggested that cities less populous by one-half than Newark, but owning plants far in excess of their needs might have diverted on June 17, 1907, twice the amount of water which the City of Newark diverted, and that a city twice as large might have diverted half as much, and the former of such cities would thereby have procured an almost perpetual exemption, and the latter would have brought on itself an insupportable burden of indefinite duration; and that accidents of climate, of conflagrations and of breaks in the mains on the critical date, June 17, 1907, would have resulted in increasing the exemption.

The enforcement by the State of the provision of the act imposing upon the City the specified annual payments for such diversion of water does not violate the equal protection clause of the Fourteenth Amendment. The regulation of municipalities is a matter peculiarly within the domain of the State. In *Trenton* v. *New Jersey*, decided this day, *ante*, 182, it is held that the imposition of the license fee specified in this act is not a taking of property of that city in violation of the Fourteenth Amendment. The reasons supporting that conclusion apply here. The City cannot invoke the protection of the Fourteenth Amendment against the State.[1] Considering the former opinions of this Court, there is no substantial federal question in the case.

The writ of error is dismissed.

BEGG ET AL., RECEIVERS OF MANHATTAN &